Supreme Court, U. S.
FILED
APR 1 1980
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

October Term, 1979

No. 79-1537

DIXON D. COWLEY, dba COWLEY PUMP AND SUPPLY, GRAHAM L. COWLEY and HUGH H. COWLEY, dba COWLEY BROS. SUPPLY, and CARDER, INC., dba RANCHERS SUPPLY COMPANY, Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation doing business in the State of Arizona, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEO R. BEUS
DAVID L. WHITE
JENNINGS, STROUSS & SALMON
111 West Monroe Street
Phoenix, Arizona 85003
(602) 262-5854
Attorneys for the Petitioners

March 31, 1980

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	22

APPENDIX:

A. Decision of the United States District Court for the District of Arizona .. App. A, A-1

B. Opinion of the Ninth Circuit Court of Appeals ..... App. B, B-1

C. Order Denying Petition For Rehearing ..... App. C, C-1

TABLE OF AUTHORITIES CITED

CASES: Page

Adolph Coors Co., 3 CCH Trade Reg. Reptr. ¶ 20,403, (FTC, 1973), aff'd 497 F.2d 1178 (10th Cir. 1974) 12

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 18

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied, 1980-1 Trade Cas. ¶ 63,182 (U.S. Sup. Ct., February 19, 1980) 14,18,19

Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979) 14

City of Mishawaka v. American Electric Power Co., 465 F.Supp. 1320 (N.D. Ind. 1979), aff'd in part, 1980-1 Trade Cas. ¶ 63,193 (7th Cir. 1980) 18

Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) aff'g 573 F.2d 980 (9th Cir. 1976) 7,8,10,11,12,13

Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975) 10

Cowley v. Braden Industries, Inc., 1980-1 Trade Cas. ¶ 63,134 (9th Cir. 1980) 4,5

Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1 (1st Cir. 1979) 14

Greyhound Computer Corporation v. IBM, 559 F.2d 488 (9th Cir. 1977) 17

Hobart Brothers Co. v. Malcolm T. Gilliland Inc., 471 F.2d 894 (5th Cir. 1973) 14

TABLE OF AUTHORITIES CITED

CASES (Continued) Page

Interphoto Corporation v. Minolta Corporation, 295 F.Supp. 711 (SD. N.Y. 1969), aff'd *per curiam* 417 F.2d 621 (2nd Cir. 1969) 14

Nat. Society of Professional Engineers v. U.S., 435 U.S. 679, 98 S.Ct. 1355 (1978) 10

Otter Tail Power Company V. United States, 410 U.S. 366 (1973) 10,17

Paschall v. Kansas City Star Co., 441 F.Supp. 349 (1977) 18,21

Pitchford v. PEPI, Inc., 531 F.2d 92 (3rd Cir. 1975), reaff'd 1977-2 Trade Cas. ¶ 61,741 (W.D. Pa. 1977) 14

Purex Corp. v. Procter & Gamble Co., 596 F.2d 881 (9th Cir. 1979) 17

Reed Brothers, Inc. v. Monsanto Co., 525 F.2d 486 (8th Cir. 1975) 10

Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971) 10

Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F.2d 1 (9th Cir. 1960). 17

Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) 13

United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945) 18

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 8,11,12

United States v. Colgate, 250 U.S. 300 (1919) 12

United States v. General Motors Corp., 384 U.S. 127 (1966) 13

United States v. Griffith, 334 U.S. 100 (1948) 14,16,18

TABLE OF AUTHORITIES CITED

CASES (Continued)	Page
United States v. Grinnell Corp., 384 U.S. 563 (1966)	14,17,18
United States v. Topco Associates, 405 U.S. 596 (1972)	10,13
United States v. United Shoe Machinery Corp., 110 F.Supp. 295 (D. Mass. 1953), aff'd *per curiam*, 347 U.S. 521 (1954)	20
White Motor Co. v. United States, 372 U.S. 253 (1963)	13
STATUTES:	
Sherman Act (15 U.S.C. §1)	3
Sherman Act (15 U.S.C. §2)	3
28 U.S.C. §1254 (1)	2
15 U.S.C. §15	4
OTHER AUTHORITIES:	
Kauper, Testimony Before Senate Antitrust And Monopoly Subcommittee On Proposed Legislation To Exempt Trademarked Food Franchises From Antitrust laws, 5 CCH Trade Reg. Rptr.	13

In The
Supreme Court of the United States

October Term, 1979

No.

DIXON D. COWLEY, dba COWLEY PUMP AND SUPPLY, GRAHAM H. COWLEY and HUGH H. COWLEY, dba COWLEY BROS. SUPPLY, and CARDER, INC., dba RANCHERS SUPPLY COMPANY, Petitioners,

v.

BRADEN INDUSTIRES, INC., a Delaware corporation doing business in the State of Arizona, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 8, 1980, and the denial of the petition for rehearing on March 4, 1980.

OPINIONS BELOW

This case proceeded to trial, without a jury, on February 11, 1976. The Honorable James M. Fitzgerald took the testimony under advisement, noting the

presence of "very complex legal issues, some of which appear to be unique and into areas of law that are not well charted". Transcript on Appeal, Volume H, pp. 201-202 ("T.H. 201-202").

A decision was rendered by Judge Fitzgerald on January 20, 1977, in effect finding against plaintiffs on all claims for relief despite the recognition of "substantial legal questions". Trial Court Decision, p. 22. The formal opinion of the United States District Court for the District of Arizona, while not reported, is reproduced in Appendix A to this petition.

The opinion of the Ninth Circuit Court of Appeals, affirming the decision of the District Court, has been reported at ¶ 63,134 of the 1980-1 Trade Cases. That opinion is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1980. A timely petition for rehearing was denied on March 4, 1980 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Braden Industries, Inc.'s admitted marketing policies and practices imposed resale restrictions on its distributors in violation of a "rule of reason" and/or *per se* approach to Section 1 of the Sherman Act.

2. Whether Braden Industries, Inc.'s conscious distribution practices and requirements, coupled with its dominant share of the windmill market, violated Section 2 of the Sherman Act even in the absence of "predatory purpose or conduct".

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act (15 U.S.C. §1) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2 of the Sherman Act (15 U.S.C. §2) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment exceeding three years, or by both said punishments, in the discretion of the court.

STATEMENT OF THE CASE

On December 7, 1972, the former Arizona distributor of Aermotor windmills (Cowley), and a Colorado retailer to whom he sold (Carder), filed a complaint against the manufacturer of such products (Braden), for, *inter alia,* alleged violations of federal and state antitrust laws. 15 U.S.C. §15. Two related subjects have been at the center of that dispute.

First, Braden has been an undisputed holder of monopoly power. Specifically, that company has continued to possess a monopoly position for the manufacturing and wholesaling of windmills in geographic markets including Arizona, Colorado and the United States as a whole. Trial Court Decision, p. 8 (Braden's share "has fluctuated between 70 percent and 80 percent, averaging around 75 percent, a sufficient share from which to infer monopoly power"), and *Cowley v. Braden Industries, Inc.,* 1980-1 Trade Cas. ¶ 63,134 at 77,658 and 77,660 (the "district court found, and the evidence established, that Aermotor has a predominant position in the windmill market. It controls between 70 and 80 percent of that market both nationally and in Colorado and in Arizona").

Second, Braden employed a bifurcated distribution system described by the Ninth Circuit Court of Appeals as follows:

> One channel of distribution was through sales by company-owned outlets or branches; the other was through sales by independent distributors. Distributorships were established to serve particular geographic areas. Aermotor agreed its branches would not compete with distributors in any given territory. In addition, Aermotor established a policy which discouraged distributors from selling within the territory of another distributor. Under Aermotor's announced policy, distributors could sell outside their territories if: (1) the goods first came to their territories; (2) the items were placed in stock; and (3) the distributors were not "actively soliciting business outside their assigned territory." ¶ 63,134 at 77,658.

In other words, Braden ensured that an "Aermotor branch is restricted to the extent that it may not sell Aermotor products either to dealers or at retail within the territory of an authorized distributor". Trial Court Decision, pp. 4-5. Then, and more importantly, Braden imposed the foregoing limitations on its distributors so that "although the restraints imposed by Aermotor did not prohibit outright sales outside of a distributor's primary area, their enforcement would make such sales economically unfeasible or, at least, significantly less profitable". *Cowley v. Braden Industries, Inc.,* ¶ 63,134 at 77,658.

Braden admitted that by means of these distribution restraints it was "interested in promoting interbrand competition, to obtain a better share of the market and to sell its products over those of a competitor". Appellee Brief, p. 34. *See also,* T.R. 811 ("to stimulate interbrand competition"); T.R. 813 ("to get a better share of the market") and T.R. 817.

The Ninth Circuit Court of Appeals succinctly translated these general resale restrictions into an effect upon the plaintiffs in this case:

> In violation of the distribution agreement, Cowley began selling windmills to purchasers in Colorado, including Carder, without first shipping the windmills through Arizona. Carder was reselling the

> windmills at substantially lower prices than the authorized Aermotor dealer for Colorado, one Dean Bennett. After Bennett complained and Aermotor warned Cowley, Aermotor terminated Cowley for persisting in making sales to Carder. ¶ 63,134 at 77,658.

Thus enforcement of the distribution policies (a) blocked Cowley from making Carder competitive with Bennett in the marketing of Aermotor windmills, and (b) caused Carder to not be able to provide consumers with lower prices than those inflated sums charged by Bennett. *See also,* T.A. 87-88; T.B. 50-58; T.B. 180 and 202; T.C. 78-80; T.C. 50-54 and 60-63; T.E. 147-148 and 157-159; and Plaintiffs' Trial Exhibits 149, 155, 168 and 181 (Bennett's favored position providing him with 10 percent of Aermotor windmill sales nationally). Judge Fitzgerald further found that the shipping restraints acted to "preclude Cowley from effectively competing with Bennett for sales to dealers in eastern Colorado". Trial Court Decision, p. 29. And finally, implementation of Braden's policies foreclosed Cowley from rendering his Colorado customers competitive with Aermotor branches selling in states adjacent to Colorado. *See, e.g.,* T.A. 95, 125-128, and 144-147; T.B. 14-17, 30-31, and 198-203; T.C. 87-89; T.H. 169-170; and Plaintiffs' Trial Exhibits 130 and 157. In short, Braden's shipping dictates led to a stoppage in intrabrand competition.[1] *See also,* T.B. 71-72 and T.H. 156-172.

---

[1] Intrabrand competition refers to competition between sellers of the same product produced by a single manufacturer. Interbrand competition, on the other hand, looks at competition between manufacturers of different brands of the same commodity.

REASONS FOR GRANTING THE WRIT

I

TERRITORIAL RESTRAINTS UNDER SECTION 1 OF THE SHERMAN ACT

The trial judge in this case concluded that there is "no doubt that Aermotor and Dean Bennett Supply combined their efforts to enforce the published policy of territorial restraint". Trial Court Decision, p. 22. Moreover, Judge Fitzgerald stated that he would have found the distribution restraints to be *per se* unlawful but for *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), aff'g 573 F.2d 980 (9th Cir. 1976). Trial Court Decision, pp. 22-23. Both the lower and appellate courts rejected plaintiffs' antitrust claim under Section 1 of the Sherman Act for the following reasons:

> In applying the *GTE Sylvania* standard, the trial court held that the territorial restraints were reasonable for three reasons. First, the requirement that a distributor take goods into his trade area before selling them improved the efficiency in marketing since it ensured the distributor's maintenance of a proper stock of goods and its intense promotion of sales in the assigned area. Second, there was no showing by appellants of any effective alternate means to maintain an efficient distributor system. Third, there was no evidence that interbrand competition was harmed by Aermotor's shipping policy. These findings of fact were fatal to the appellants' case. ¶ 63,134 at 77,659.

It is respectfully urged that this Court consider and remedy five errors, with severe repercussions, connected with such an approval of the territorial restrictions imposed by Braden. Each of those errors relates to legal and economic analysis, not a second-guessing of factual findings.

First, the opinions in this litigation have misconstrued the Court's ruling in *Continental T.V. Inc.* Although this Court determined therein that the broad *per se* approach of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) should be rejected, it did not remove territorial impositions from antitrust scrutiny. Yet that is the practical effect of Judge Fitzgerald's and the Ninth Circuit's interpretations of *Continental T.V. Inc.*

The impact of the opinion in *Continental T.V. Inc.* is merely to cause vertical limitations to now be generally subjected to a rule of reason analysis, essentially utilizing an economic impact test that balances reductions in intrabrand competition with increases, if any, in interbrand competition so as to measure overall economic consequences. 433 U.S. at 51-54 (the "market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition"). In the context of this economic impact test and the factors determined material by the Court in *Continental T.V. Inc.*, the case *sub judice* stands in stark opposition with that opinion on every relevant fact. In *Continental T.V. Inc.*, (a) Sylvania held an insignificant market share at the time the shipping policy was adopted (Braden possessed at least a 70 percent share), (b) Sylvania's market share increased

to only five percent with the utilization of the territorial practices (Braden maintained its monopoly power), (c) the market contained approximately 100 other manufacturers with a non-party holding a 60 percent share (the windmill industry having less than four other suppliers), (d) at least two franchised Sylvania retailers were situated within each large metropolitan area (Aermotor distributors and company-owned branches being geographically spaced so as to not be effectively competitive), and (e) Sylvania imposed no restrictions on the right of the franchisee to sell the products of competing manufacturers (Braden having such a limitation). To ignore these distinctions on every major point is to permit virtually all territorial restrictions to be free from the federal antitrust laws. If the opinions in this case stand, what fact pattern does suggest illegality under Section 1?

Second, the judges in this case essentially found the territorial restrictions to be reasonable due to the manufacturer's interest in ensuring that its distributors intensely promote sales in the assigned geographic

areas.[2] In effect, these opinions permit a defendant to avoid antitrust responsibility by simply saying that the resale restrictions are imposed for its own self-interest. Are the antitrust laws to be rendered impotent in light of a manufacturer's insistence that his conscious acts are for the reason of increasing his competitive position? The antitrust laws are not so easily displaced. In fact, this Court has noted that such self-interests are insignificant. *See, Otter Tail Power Company v. United States,* 410 U.S. 366, 380 (1973) (the "promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct"); *United States v. Topco Associates,* 405 U.S. 596, 610 (1972) (defendants have "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy, [and] on the contrary, the Sherman Act gives to each Topco member . . . the right to ascertain for itself whether or not competition with other supermarket

[2] Under *Nat. Society of Professional Engineers v. U.S.,* 435 U.S. 679, 98 S.Ct. 1355 (1978), the "rule of reason" test "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason [but instead] it focuses directly on the challenged restraints impact on competitive conditions". 98 S.Ct. at 1363. The analysis is "confined to a consideration of impact on competitive conditions". *Id.* at 1364. Thus the Ninth Circuit was not free to determine "reasonableness" from the manufacturer's interest in ensuring a "proper stock of goods". *Id.* at 1366.

Equally puzzling, and in opposition with other case law, is the appellate court's criticism of plaintiffs' failure to show "an effective alternate means to maintain an efficient distributor system", presumably other than by giving the distributors the right to sell where they wish. ¶ 63,134 at 77,659. *See, e.g., Reed Brothers, Inc. v. Monsanto Co.,* 525 F.2d 486 (8th Cir. 1975); *Copper Liquor, Inc. v. Adolph Coors Co.,* 506 F.2d 934 (5th Cir. 1975) and *Siegel v. Chicken Delight, Inc.,* 448 F. 2d 43 (9th Cir. 1971). In *Continental T.V. Inc.,* Justice Powell wrote of the irrelevance of looking to "least restrictive alternatives". 433 U.S. at 58 n.29.

chains is more desirable than competition in the sale of Topco-brand products"), and *United States v. Arnold, Schwinn & Co.,* 388 U.S. at 375.

Third, and in a related vain, these lower courts have fundamentally misconstrued the Court's test of balancing intrabrand restrictions with interbrand stimulation. The trial and appellate court treated the test of reasonableness as satisfied, because of supposed increases in interbrand competition, if the manufacturer asserts the territorial restriction is for the purpose of increasing *that entity's* market share. Obviously, as a matter of economic and common sense, the relevance of increases in interbrand competition is with reference to the *market as a whole,* not the particular defendant in question. To conclude otherwise is to excuse any defendant, even a monopolist, in virtually every setting.

Additionally, the earlier decisions held there was "no evidence that interbrand competition was harmed by Aermotor's shipping policy". But why is such a showing required in the face of acknowledged adverse impacts on intrabrand competition? *Continental T.V. Inc. v. GTE Sylvania Inc.,* 97 S.Ct. at 2560 ("vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers") and Trial Court Decision, p. 29 (defendant's "shipping policy had some adverse impact on intrabrand competition"). And is not interbrand competition for the market as a whole necessarily retarded when a monopolist employs a distribution system for the purpose of acquiring a larger market share?

Fourth, the earlier opinions have given inadequate attention to the fact that the defendant here is a monopolist. That fact should have been determinative, as this Court has hinted on various occasions. *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. at 52 n.19 (the "extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer") and, Justice White concurring, 433 U.S. at 64-65 (the "Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there [and] in other areas of antitrust law, this Court has not hesitated to base its rules of *per se* illegality in part on the defendant's market power");[3] *United States v. Arnold, Schwinn & Co.*, 388 U.S. at 1864; and *United States v. Colgate,* 250 U.S. 300, 307 (1919) (in "the absence of any purpose to create or maintain a monopoly", the Sherman Act does not restrict the right of a manufacturer freely to exercise his own independent discretion as to the parties with whom he will deal).

As explained in *Continental T.V. Inc.*, the free enterprise system is best served when there is "fierce intrabrand competition among the distributors of a product produced by a monopolist". 433 U.S. at 52 n.19. The opinions in this case have failed to heed that warning, and have conflicted with other judicial decisions. *See, e.g., Blankenship v. Hearst Corporation,* 519 F.2d 419 (9th Cir. 1975) and *Adolph Coors Co.*, 3 CCH Trade Reg. Rptr. ¶ 20,403 at 20,293 (FTC, 1973),

[3] The majority in *Continental T.V. Inc.* recited that "we do not foreclose the possibility that particular applications of vertical restrictions might justify *per se* prohibition". 433 U.S. at 58. Braden's dominance lends itself to such treatment.

aff'd 497 F.2d 1178 (10th Cir. 1974) (it "is where the manufacturer of a branded item possesses substantial market power . . . that vertical territorial restrictions are especially pernicious, for they eliminate the possibility of intrabrand competition which in an imperfect market is a critical supplement to competition between and among different brands"). See generally, Kauper, Testimony Before Senate Antitrust And Monopoly Subcommittee On Proposed Legislation To Exempt Trademarked Food Franchises From Antitrust Laws, 5 CCH Trade Reg. Rptr. at 55,235 ("in concentrated industries which emphasize brand differentiation promotion, the elimination of intrabrand competition is particularly undesirable [since] territorial restrictions on distribution tend to extend the oligopolistic characteristics present at the manufacturing level down the chain of distribution").

Fifth, the prior opinions failed to follow the teachings of this Court pertaining to the particular concern, and indeed *per se* treatment, accorded those territorial restraints within a horizontal context. *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. at 48 n.28 ("no doubt" that horizontal restrictions are *per se* illegal); *United States v. Topco Associates, Inc., supra; United States v. General Motors Corp.* 384 U.S. 127 (1966); *White Motor Co. v. United States,* 372 U.S. 253, 267 (1963) and *Timken Roller Bearing Co. v. United States,* 341 U.S. 593 (1951). Judge Fitzgerald presumably was influenced by the fact that the restraints were initially imposed by the manufacturer rather than competing distributors in the guise of a vertical restriction, but that distinction appears to be irrelevant in terms of economic impact. The distribu-

tors cannot effectively compete with Aermotor branches irrespective of whether the manufacturer or the competing distributors initiate the resale controls. Trial Court Decision, p. 25. In any event, Judge Fitzgerald's opinion is at odds with other authority on this score. *See, e.g., Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1 (1st Cir. 1979); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979); *Pitchford v. PEPI, Inc.*, 531 F.2d 92 (3rd Cir. 1975), reaff'd 1977-2 Trade Cas. ¶ 61,741 (W.D. Pa. 1977); *Hobart Brothers Co. v. Malcolm T. Gilliland Inc.*, 471 F.2d 894 (5th Cir. 1973) and *Interphoto Corporation v. Minolta Corporation*, 295 F.Supp. 711 (S.D. N.Y. 1969), aff'd *per curiam* 417 F.2d 621 (2nd Cir. 1969).

II
MONOPOLIZATION UNDER SECTION 2 OF THE SHERMAN ACT

This litigation highlights the continuing struggle of trial and appellate courts in implementing the broad directives of this Court in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and *United States v. Griffith*, 334 U.S. 100 (1948). As Justice Rehnquist recently noted in his dissenting opinion to the denial of the petitions for writs of certiorari in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 1980-1 Trade Cas. ¶ 63,182 (U.S. Sup. Ct., February 19, 1980), the "Court cannot remain wholly above the battle" of managing complex cases under Section 2 of the Sherman Act. ¶ 63,182 at 77,891. While theories and concerns about monopolization are at the heart of our free enterprise

system and the federal antitrust laws, doctrinal development is but beginning and lower courts face unwieldy litigation simply in dealing with the basic prerequisites of Section 2.

The present case offers the Court an opportunity to give guidance on the most fundamental, but yet still debated, elements in reviewing conduct potentially violative of the federal antitrust statutes. It seems surprisingly late in the day for courts to question whether "predatory conduct or intent" is required in order for a plaintiff to possibly prevail under Section 2, yet that appears to be the case.

The trial court rejected plaintiffs' claim of monopolization precisely for lack of "predatory conduct". Trial Court Decision, p. 8. *See also,* Trial Court Decision, p. 14 ("doubt whether there is a Sherman 2 violation where the defendant has no monopoly purpose and has performed nonpredatory affirmative acts that tend to maintain a dominant market share"). Similarly the Ninth Circuit Court of Appeals squarely focused on this point and held:

> . . . we believe that the district court properly concluded that appellants failed to meet their burder of proof under the *Grinnell* test.
>
> The district court found, and the evidence established, that Aermotor has a predominant position in the windmill market. It controls between 70 and 80 percent of that market, both nationally and in Colorado and Arizona. Thus, the first part of the *Grinnell* test was met. There was no evidence, however, that Aermotor acquired or *maintained its market position through the use*

of predatory conduct as required by the second part .... and there is no evidence that these restraints were used with *predatory intent.* (Emphasis added). ¶ 63,134 at 77,660.

It is respectfully urged that the Court accept this petition and expressly address whether predatory purpose and/or conduct plays any necessary role in ascertaining the presence of monopolization. The undersigned's position is that to allow predation to exist as an apparent prerequisite is to (a) fuel the disturbing trend toward economic concentration and larger corporate size, (b) to cause plaintiffs, less sure of their increasingly difficult burden under Section 2, to face the practical need for offering complexity and lengthy testimony at trial, and (c) to remove the effective check that private rights of action must provide for a monopolist's conscious activities.

A reading of this Court's pronouncements on Section 2 suggests that Judge Fitzgerald and the Ninth Circuit panel erred in focusing upon predatory motive or acts. Precedent does not call for such a showing and, indeed, speaks of its unimportance.

In *United States v. Griffith, supra,* Justice Douglas wrote that (a) it is "not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the antitrust laws have been violated [as it] is sufficient that a restraint of trade or monopoly results as a consequence of a defendant's conduct or business arrangements", (b) since no monopolist monopolizes unconscious of what he is doing, a requirement of "a greater showing would cripple the

Act" and (c) "monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised." 334 U.S. at 105-107.

Furthermore, the Court has routinely decided that monopolizing acts could be found with conduct no more "predatory" than that evidenced by the instant case. *See, e.g., Otter Tail Power Company v. United States,* 410 U.S. 366 (1973) (affirming a judgment that an electric utility company monopolized the retail distribution of electric power by using refusals to sell power at wholesale to proposed municipal systems that might compete); *United States v. Grinnell, supra* (improper conduct came with the negotiation for exclusive contracts).

Significantly, the appellate opinion here also conflicts with other decisions within the same Ninth Circuit. In *Greyhound Computer Corporation v. IBM,* 559 F.2d 488 (9th Cir. 1977), Judge Browning stated it "is no answer to the charge to say that these practices are not 'predatory' but 'honestly industrial'—that is, of a kind an ordinary enterprise might utilize with impunity". 559 F.2d at 498. *See also, Purex Corp. v. Procter & Gamble Co.,* 596 F.2d 881, 890 (9th Cir. 1979) (recognizing "that 'otherwise lawful practices that unnecessarily excluded competition' could be actionable under Section 2 of the Sherman Act when used by the dominant firm in an industry"), and *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.,* 284 F.2d 1, 26 (9th Cir. 1960) ("we find it not necessary to find a specific intent to restrain trade or eliminate a competitor or to create a monopoly").

Other circuits, similarly attempting to understand and apply the standards of *Griffith* and *Grinnell,* have reached results inconsistent with the decisions in this case. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 274 (2nd Cir. 1979) (even "if the origin of the monopoly power was innocent ... the *Grinnell* rule recognizes that maintaining or extending market control by the exercise of that power is sufficient to complete a violation of §2"); *City of Mishawaka v. American Electric Power Co.,* 465 F.Supp. 1320, 1330 (N.D. Ind. 1979) (one "possessing monopoly power need not be found to have engaged in predatory conduct in order to have engaged in prohibited monopolization [as] frequently the offense of monopolization is based on the conclusion that the defendant has engaged in 'exclusionary conduct' —conduct that does not further competition on the merits or that tends to impair the opportunities of his rivals to compete"); aff'd in part, 1980-1 Trade Cas. ¶ 63,193 (7th Cir. 1980); *Paschall v. Kansas City Star Co.,* 441 F.Supp. 349, 361 ("it is doubtful that, even in 1911, §2 prohibited only monopolies obtained by unlawful restraints and predatory practices"); and *United States v. Aluminum Co. of America,* 148 F.2d 416, 431 (2nd Cir. 1945) (defendant therein insisted that "it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization").[4]

[4] The Alcoa opinion was endorsed by this Court in *American Tobacco Co. v. United States,* 328 U.S. 781 (1946).

While judicial consideration of Section 2 has led to criticism of monopoly power and recognized the evils associated with such dominance, courts correctly have not declared monopolies unlawful *per se.* To decline to take that ultimate step is to recognize that monopolies may be thrust upon an entity, that a successful competitor must not be automatically rewarded with legal condemnation, and that innovation, expertise and related worths should not be discouraged. But recognition of these caveats does not, and should not, equate with applauding the holder of monopoly power except for predatory acts. The dividing line is rather as set forth in *Berkey Photo, Inc. v. Eastman Kodak Co., supra:*

> The key to analysis, it must be stressed, is the concept of market power .... A firm that has lawfully acquired a monopoly position is not barred from taking advantage of scale economies by constructing, for example, a large and efficient factory. These benefits are a consequence of size and not an exercise of power over the market. Nevertheless, many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. *See Telex Corp. v. International Business Machines Corp.,* 510 F.2d 894, 925-26 (10th Cir.), cert. dismissed, 423 U.S. 802, 96 S.Ct. 8, 46 L.Ed.2d 244 (1975). A classic illustration is an insistence that those who wish to secure a firm's services cease dealing with its competitors. *See, e.g., Lorain Journal Co., supra.* Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial." 603 F.2d at 274-275.

This accommodation was also nicely illustrated in *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D. Mass. 1953), aff'd *per curiam*, 347 U.S. 521 (1954), which condemned leasing practices specifically found to not be predatory:

> [T]hey are not practices which can be properly described as the inevitable consequences of ability, natural forces, or law. They represent something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production and distribution, which a competitive society must foster. They are contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further the dominance of a particular firm. In this sense they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market. 110 F.Supp. at 344-345.

The present case has been tainted with an emphasis on predation. In fact, the undisputed evidence should have been sufficient by exhibiting a distribution scheme used by the defendant because it is "interested in promoting interbrand competition, to get a better share of the market and to sell its products over those of a competitor". Record on Appeal, page 821; Appellee Brief, p. 34; T.R. 811-817. Maintenance of Braden's market share was not associated with economies of scale, accessible resources, or invention. By its own admission, the defendant looked to its territorial impositions to influence market shares.

Perhaps judicial difficulties with Section 2 are understandable, and are as frustrating as recently explained in *Paschall v. Kansas City Star Co., supra:*

> As plain and forthright as the language of this section appears, there are but two things which may be confidently said about it: First, mere possession of monopoly power does not constitute the offense of monopolization; something more is needed. . . . Second, concerted action is unnecessary to constitute the offense of monopolization; unilateral monopolization violates the Sherman Act . . . . It is at this point that a Court's confidence in applying Section 2 of the Sherman Act to the facts before it must end, for it is at this point that the question which has plagued the legal, judicial, and academic communities must be faced: What conduct must a defendant, who possesses monopoly power, engage in before he is to be found guilty of transgressing the dictates of Sherman §2? . . .
>
> While the test enunciated by the Supreme Court in *Grinnell* is a good and functional test for identifying those guilty of monopolization, it does not, by any means, end the uncertainties which pervade this area of law. Nor does it easily resolve the application of the test to varying factual situations. 441 F.Supp. at 359-363.

This petition offers a vehicle for confronting such problems.

CONCLUSION

This case raises issues of unusual importance for the administration of justice in the federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leo R. Beus
David L. White
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

March 1980

CERTIFICATE OF SERVICE

I am one of the attorneys for the Petitioners and am a member of the bar of this Court. I hereby certify that I caused three copies of the foregoing Petition for Writ of Certiorari to be mailed, postage prepaid, on March 31, 1980, to:

Roger R. Scott, Esq.
LAWRENCE, SCOTT & LAMB
525 South Main Street, Suite 204
Tulsa, Oklahoma 74103

All parties required to be served have been served.

David L. White

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GRAHAM L. COWLEY and HUGH H. COWLEY, dba Cowley Bros. Supply, and CARDER, INC., dba Ranchers Supply Company, *Plaintiffs,* vs. BRADEN INDUSTRIES, INC., *Defendant.*	NO. CIV-72-695-PHX

Before: The Honorable JAMES M. FITZGERALD
United States District Judge

Date: JANUARY 20, 1977

Place: TUCSON, ARIZONA

THE COURT: I wish to place on the record my decision in Civil Case No. 72-695, Phoenix, Dixon D. Cowley dba Cowley Pump and Supply, Graham L. Cowley and Hugh H. Cowley dba Cowley Bros. Supply, and Carder, Inc., dba Ranchers Supply Company, Plaintiffs, v. Braden Industries, Inc., a Delaware Corporation, doing business in the State of Arizona, Defendants.

This case concerns the marketing of Aermotor windmill and pump products in the southwest and western plains states, principally within the states of Arizona and Colorado.

The first claim of plaintiff Dixon D. Cowley dba Cowley Pump and Supply Company alleges that defendant Aermotor, a division of Braden Industries, imposed a territorial restraint upon Cowley, formerly the Aermotor distributor in the State of Arizona, in violation of the Sherman Act, 15 USC 1.

The second claim alleges that Aermotor discriminated in prices between Cowley and Dean Bennett Supply Company, the Aermotor distributor in the State of Colorado, contrary to provisions contained in Section 2 of the Clayton Act, 15 USC 13.

The third claim alleges that Aermotor tied pumps to the purchase of windmills in violation of Section 3 of the Clayton Act, 15 USC 14, and Section 1 of the Sherman Act, 15 USC 1. Plaintiffs have abandoned this claim.

In the fourth claim it is alleged that Aermotor refused to deal with plaintiff Carder, Inc., dba Ranchers Supply Company of Colorado, in violation of Section 1 of the Sherman Act, 15 USC 1.

In the fifth claim plaintiffs allege that Aermotor unjustifiably interfered with plaintiffs' contract rights.

The sixth claim alleges that Aermotor has monopolized or attempted to monopolize the windmill industry in violation of Section 2 of the Sherman Act, 15 USC 2.

The seventh claim alleges that Aermotor's conduct as alleged under the Sherman and Clayton Acts constitutes a violation of the antitrust laws of Arizona and Colorado.

Plaintiffs ask for treble damages under Section 4 of the Clayton Act, 15 USC 15, for the alleged anticompetitive conduct of Aermotor.

Aermotor has raised counterclaims against plaintiffs Cowley for amounts said to be owed to Aermotor for purchases made by Cowley prior to his termination as distributor for Aermotor products in Arizona.

Since the marketing of Aermotor products substantially affects interstate commerce, jurisdictional requirements are met under 15 USC 15 and 28 USC 1337.

Braden Industries is organized into several divisions. The Aermotor Division manufactures and markets water systems. Aermotor windmills have been on the market for many years and more recently Aermotor has entered the market with a pump line including jets, submersibles and centrifugals. But this case has to do principally with Aermotor windmills.

Aermotor involvement in the windmill market dates back to 1888. For many years the company manufactured its windmills but in 1967 Aermotor entered into a licensing agreement with Fabrico do Implemotos Agribules S. H. of Argentina to fabricate and manufacture windmills. Windmill towers, however, are apparently fabricated or manufactured in this country. The windmills are manufactured in Argentina, shipped to the United States and warehoused, awaiting shipment on orders. For a period of time Aermotor's

windmill warehouse was located at Tulsa, Oklahoma, but some years ago the Tulsa warehouse was closed and Aermotor windmills have since been warehoused at Dallas, Texas.

Aermotor marketed its windmills and pumps through company outlets or branches and through independent distributors. it may be said that an Aermotor branch is a company outlet where Aermotor products are stocked for sale to Aermotor distributors or dealers. An Aermotor branch is restricted to the extent that it may not sell Aermotor products either to dealers or at retail within the territory of an authorized distributor.

Aermotor has entered into contracts with a number of distributors. Under these agreements distributors are assigned a territory in which, with certain limited exceptions, the distributor has the sole and exclusive right to sell Aermotor products to dealers and at retail without competition from Aermotor. Most of this lawsuit is involved with Aermotor's marketing policies insofar as those policies affect distributors. Two distributors are directly involved, the distributorship of Dean Bennett of Colorado and the distributorship of Dixon D. Cowley in Arizona.

Prior to 1965, American Pipe and Supply of Denver was distributor of Aermotor products in Colorado. In April of that year Dean Bennett left the employ of American Pipe and established Dean Bennett Supply. He then became Aermotor distributor for Colorado. American Pipe became a distributor of Dempster products, a competitor of Aermotor in the windmill line. Dixon D. Cowley was in 1966 employed by Moses Pump and Supply of Phoenix, then the Aermotor distributor for Arizona. Moses Pump and Supply was acquired by Sta-Rite, a pump manufacturer. Cowley then left Moses Pump and established Cowley Pump and Supply at Phoenix. In August of 1966 he became the Aermotor distributor for Arizona and was terminated in November of 1971.

Aermotor has for some years occupied approximately 70 percent of the windmill market. Its competitors include Heller Aller of Napoleon, Ohio, the manufacturer of Baker windmills, and Dempster Industries, manufacturing the Dempster windmill at Beatrice, Nebraska. Although Aermotor occupies a dominant position in the windmill market, the same is not true in the pump line. Aermotor has manufactured centrifugal pumps since the early 1900's, but its main effort to expand its pump line occurred after World War II. At that time Aermotor began marketing submersible and jet pumps. Competition in the pump market is keen and Aermotor as a serious competitor is a relative latecomer.

The importance of windmills to water systems is limited principally to providing stock water in cattle ranching country. Ordinarily water can be produced more efficiently by electric pumps but where electrical distribution lines are distant, as in range country, windmills provide an adequate and reliable method of providing stock water. Aermotor windmills have for years carried a fine reputation and several ranchers have testified to their excellent quality.

During the period of Cowley's distributorship in Arizona, James E. Fetters was the general manager of Aermotor Division and he was and is a vice president of Braden Industries as well. Fetters, for the most part, dealt directly with Dixon D. Cowley and with Dean Bennett of Dean Bennett Supply of Colorado.

THE ALLEGED ANTITRUST VIOLATIONS

MONOPOLY

Plaintiffs claim that Aermotor has monopolized and attempted to monopolize the windmill market in violation of Section 2 of the Sherman Act.

According to the plaintiffs' claim, Aermotor possesses monopoly power in the windmill industry and has unlawfully used its dominant market position to extract monopoly profits, dominate and exclude competitors, force the sale of pumps with windmills, and extend its monopoly into the Colorado wholesale market by eliminating intrabrand competion, thus protecting the Dean Bennett distributorship.

Aermotor makes two arguments in defense: At the outset Aermotor claims plaintiffs have failed to prove that Aermotor's share of the Colorado and Arizona market is sufficient to constitute monopoly power. Second, even assuming Aermotor possessed the requisite market share, Aermotor did not use its market position to stifle any competition between Aermotor and the plaintiffs. Defendant argues that plaintiffs have never engaged in competition with Aermotor in the distribution of windmills, and therefore have not been injured by reason of the alleged monopoly.

It is well settled that in order to establish a violation of Section 2 of the Sherman Act it is necessary to prove two elements:

> "(1) The possession of monopoly power in the relevant market, and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident ... United States v. Grinnell, 384 U.S. 563 (1966)."

It is not seriously disputed that the relevant product market is windmills. Moreover, the evidence clearly establishes that Aermotor has a predominant position in the sale of windmills nationally and in the states of Colorado and Arizona. Aermotor's share of windmill sales in these respective geographic markets has fluctuated between 70 percent and 80 percent, averaging around 75 percent, a sufficient share from which to infer monopoly power. See Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc. 526 F.2d 1196 (9th Cir. 1975). In that case defendant's percentage of the Hong Kong export market for oranges ranged from 45 percent to 70 percent.

However, the evidence fails as to the second element, conduct by which the defendant purposefully acquires, maintains or exercises monopoly power. There is no evidence whatsoever that Braden acquired its dominant market position through the use of predatory conduct. To the contrary, there is some evidence

that Aermotor attained its position in the windmill market by virtue of having a superior product and the fact that many windmill manufacturers dropped out of the business during World War II.

Likewise, plaintiffs have failed to prove that Aermotor extracted monopoly profits as a consequence of their dominant position in the industry. The evidence shows that Aermotor made about 180 percent profit on most windmills but it fails to show that prices of Aermotor windmills were greater than the prices of competing brands. It appears that Aermotor mills were in fact competitively priced and that the profit factor resulted from lower production costs rather than any design to control prices.

There is also a failure of proof on plaintiffs' claim that Aermotor used its dominant position in the windmill market to improve its pump sales by tying pump sales to windmill sales. All the evidence shows is that Aermotor emphasized the promotion of pump sales to its distributors because the company believed that the future of the ground water systems market lies in pumps, not windmills. The evidence establishes that James Feters knew that Dean Bennett was using windmills as leverage in selling pumps in 1967 but falls short of establishing that Aermotor condoned tie-in arrangements or conspired with Dean Bennett or any other distributor in an effort to tie pump purchases to windmills. It is clear that Aermotor never refused to ship Cowley a truckload of windmills because he had failed to purchase pumps. Furthermore, the 1969 written statement of policy published by Aermotor regarding shipment to distributors, Exhibit 133, also made it clear that Aermotor did not condone in its

published policy tie-ins. Nor is there evidence that Aermotor's position in the pump market was improved as a result of the alleged use of windmills as leverage.

Finally, and most significantly, plaintiffs have failed to establish that Aermotor used its monopoly power to dominate or exclude competitors. Plaintiffs Cowley and Carder maintain that they, in addition to John Smith of Smith Hardware, were competitors of Aermotor with respect to the distribution of windmills by virtue of the fact that Aermotor sold windmills through company outlets as well as through independent distributors. This contention is crucial to plaintiffs' Section 2 claim because if the plaintiffs are not competitors of Aermotor they have not suffered the injury to their business by reason of defendant's monopolistic conduct, which is a requirement for maintenance of a treble damage action under Section 4 of the Clayton Act, 15 USC 15, which provides in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

This Circuit has adopted the target test for determining the Clayton Section 4 standing. That approach focuses on the claimant's relationship to the area of the economy injured by the alleged conduct of the defendant. The claimant must prove that he "is within that area of the economy which is endangered by a

breakdown of competitive conditions in a particular industry. Otherwise he is not injured by reason of anything forbidden in the antitrust laws." In Re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir.1973).

I interpret Multidistrict Vehicle Air Pollution to require identification of the level of the product market or industry against which anticompetitive conduct was allegedly directed, not simply the relevant industry. For example, the court in the Multidistrict case studied the complaint, then concluded on the basis of the assessments that the affected area of the economy was that concerned with the research, development, manufacture, installation and patenting of automotive air pollution control devices. 481 F.2d at 129.

Applying this analysis to the instant case, I conclude that the allegations encompass the distribution as well as the manufacture of windmills. However, there is no evidence that Aermotor intended to or attempted to monopolize the wholesale or retail distribution of windmills. Cowley was replaced with another independent distributor in Arizona, not with an Aermotor branch. Bennett Supply of Colorado was also an independent distributor. Independent distributors were installed in Texas and in California. Instead of eliminating independent distributors, Aermotor has modified its former distribution system that relied entirely on Company outlets. Furthermore, plaintiffs have never engaged in competition with Aermotor for wholesale windmill sales. Cowley sold only to accounts in Arizona and Colorado. Carder's wholesale sales in 1970-73 did not include any sales to markets outside of Colorado. It is undisputed that Aermotor refrained

from competing for wholesale or retail sales in Arizona and Colorado. There is a limited exception in Arizona related to the Indian tribes.

The complete absence of any evidence that Aermotor entered into competition with plaintiffs for the sale of windmills or attempted to take over the distribution of windmills distinguishes the instant case from those relied on by plaintiffs.

Plaintiffs cite Poster Exchange, Inc. v. National Screen Services Corp., 431 F.2d 334 (5th Cir. 1970), and Eastman Kodak Co. v. Southern Photo Materials Co., 237 U.S. 359 (1927), for the proposition that vertically integrated manufacturers (those who distribute in addition to producing) cannot eliminate competitors at any level without violating Sherman Section 2. Poster Exchange involved a national manufacturer and distributor of movie advertising accessories who entered a local market and drove the existing local distributor out of business by refusing to adequately supply the local distributor, inflating prices and then refusing to deal. The trial court specifically found that National Screen intentionally used the monopoly power it had at the manufacturing level to eliminate Poster as a competitor at the distributor-jobber level. The situation in Eastman Kodak was similar. The defendant, a national manufacturer, bought out a local dealer who competed with the plaintiff dealer, then refused to sell plaintiff supplies at the dealer discount.

In both Poster Exchange and Eastman Kodak, a manufacturer entered into direct competition with a local distributor—then drove the distributor out of business by use of unfair tactics. Similarly in Industrial Bldg. Materials, Inc. v. Interchemical Corp.,

437 F.2d 1336 (9th Cir. 1970), it was alleged that the defendant manufacturer entered into competition with the plaintiff distributor and then drove him out of business. The court distinguished cases where a manufacturer simply changes distributors and commented that:

> "When a distributor is replaced by another, the public is given a substitute with no diminution in the number of distributors offering services, but when the manufacturer enters the field and then removes a distributor, the public is left with only the manufacturer instead of the manufacturer and the independent distributor. Accomplishment of this anti-competitive subjective by a manufacturer in a dominant market position by means of conspiracy and unfair tactics must surely be proscribed by the antitrust laws." ("437 F.2d 1336 at 1342-3")

Finally, Pacific Coast Exports Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975), makes it very clear that the former distributor plaintiff's claim was that the defendant's control of supply was employed to extend its monopoly illegally into distribution. (526 F.2d at 1204). The former distributor in Sunkist had standing to assert a Sherman Section 2 claim because the distributor was able to prove that Sunkist, the supplier, moved into and monopolized distribution of the product in the Hong Kong market.

Cowley and Carder make no such claim. Even assuming that Aermotor has purposefully acted to maintain a monopoly position in the manufacture of windmills, plaintiffs as Aermotor dealers are not injured by reason of the monopoly as would be a

competing manufacturer like Dempster. The only proved conduct by defendant which arguably has the purpose and effect of maintaining Aermotor's market position in windmills is use of the exclusive distributorship system. I doubt whether there is a Sherman 2 violation where the defendant has no monopoly purpose and has performed non-predatory affirmative acts that tend to maintain a dominant market share. No case cited by plaintiffs actually goes so far.

Territorial Restraints

Plaintiffs claim that Aermotor imposed an illegal territorial restraint on Cowley's sale of windmills in violation of Section 1 of the Sherman Act.

It is well established that Aermotor has announced the following as its published policy:

> "Aermotor will not knowingly ship pump and/or windmill merchandise from Aermotor stocking points into the territory of an exclusive distributor without an order or consent from the distributor with whom we have an agreement for the territory.
>
> Aermotor customers are free to sell and/or ship Aermotor merchandise from their stock in their territory as they may see fit so long as they do not violate their agreement by actively soliciting business outside their assigned territory."
> Stipulated fact no. 45. Joint pre-trial statement.

Cowley's claim of territorial restraint is broader, however, since he claims that Aermotor's policy during the time of his distributorship precluded him from shipment of Aermotor products into the territory of another distributor under any circumstances. He claims that his termination as a distributor occurring

in November of 1971 was the direct result of his refusal to adhere to Aermotor's policy of prohibiting shipment of Aermotor products into the territory of another distributorship. Plaintiffs contend that Aermotor's shipment policy and the claimed prohibition of sales by Cowley into Colorado constitute per se violations of Section 1 of the Sherman Act and are unreasonable restraints of trade.

Aermotor denies that it has ever prohibited Cowley from selling to Colorado customers and contends that Cowley's distributorship in Arizona was terminated by reason of Cowley's failure to satisfactorily perform as an Aermotor distributor in Arizona. Aermotor maintains that its shipment policy and distribution system are reasonable and are not per se violations of Section 1 of the Sherman Act.

There are several threshhold questions. First, it is necessary to determine Cowley's standing. The evidence establishes that Cowley was repeatedly admonished by Fetters to adhere to the shipment policy on the threat of losing the Arizona distributorship. The precipitating factor in Cowley's termination was Fetter's belief that Cowley was violating the shipment policy in handling the shipment to Carder on October 20, 1971. Hence, Cowley has standing to claim that he was injured by reason of the claim of territorial restraint and may maintain his claim under Section 4 of the Clayton Act. 15 USC 15.

Assuming that Cowley has the requisite standing, it then becomes necessary to determine the actual extent of territorial restraint placed upon Cowley by Aermotor.

In 1965 the Aermotor distributor in Arizona was Moses Pump and Supply of Phoenix. Sta-Rite, a pump manufacturer, acquired Moses Pump and Supply and installed a stock of Sta-Rite pumps. Following the acquisition, Moses Pump, now under the control of Sta-Rite, began, as a distributor, to change over its dealers from the Aermotor Pump line to the Sta-Rite line, which was thought to be more complete. Moreover, Moses Pump and Supply became a factory branch of Sta-Rite rather than a distributor. At the time of Sta-Rite's acquisition of Moses Pump and Supply, Dixon D. Cowley was employed by Moses Pump. He then left the employ of Moses Pump and Supply and organized Cowley Pump and Supply. In August of 1966 letters were sent by Aermotor to Aermotor dealers in Arizona that Cowley Pump and Supply was the new Aermotor distributor.

At the time Dixon Cowley became Aermotor's distributor in August of 1966, hi father at St. Johns, Arizona, had a truckload of windmills on order. Since it was unwise to build up a large inventory in windmills, an arrangement was worked out by Cowley and his father whereby Cowley sold Aermotor windmills from his father's stock in St. Johns. Originally the father, Graham L. Cowley, and Hugh H. Cowley, dba Cowley Brothers Supply, were plaintiffs but their claim has since been terminated by a stipulated dismissal, as parties.

In the spring of 1967 Cowley was visited by Carl Estep, a manufacturer's representative who traveled about the State of Arizona and the Southwest. Estep inquired whether Cowley would be interested in selling truckload quantities of windmills to Smith Hardware at Haxton, Colorado. After some negotiation Cowley agreed to sell Smith truckload quantities of windmills at Cowley's cost plus 5 percent. He concluded that on a truckload basis, which would be a minimum of 10,000 pounds and could be as high as 40,000 pounds, that the 5 percent commission or profit to him would be somewhere between $500 and $2000, depending on the size of the load. His only effort would be to make a few telephone calls and mail the purchase order and the expense would amount to a maximum of $10.00. After the bargain was struck, Smith Hardware, a substantial dealer, began buying windmills through Cowley instead of Dean Bennett Supply at Denver. In May of 1967, Carder of Ranchers Supply at Lamar, Colorado placed his first order for windmills with Cowley through Smith.

By February 3 of 1968, Dean Bennett was aware that someone other than his company was making substantial sales of Aermotor windmills to dealers in Colorado. In a letter under that date, Bennett informed Fetters that Dean Bennett Supply had made no sales to Smith Hardware of Haxton, Colorado after July 5, 1967. Someone of Dean Bennett Supply calling upon Smith observed an Aermotor shipping manifest

for a shipment to Cowley Pump and Supply of Phoenix, Arizona. In addition, Bennett or his agent located four 6-foot, twelve 8-foot, and six 10-foot Aermotor windmills in Smith's warehouse, at Haxton.

Fetters' response to Dean Bennett indicated a small degree of concern and was not at all satisfactory to Bennett. A further exchange of correspondence took place. On March 6, 1968, Fetters again wrote Bennett pointing out that it was difficult for him to understand how Cowley could sell to Smith since at the relative time Cowley was buying at standard dealer discount. Moreover, in July of 1967, Colorado and the West Coast distributorships were the only areas where distributor discounts for windmills were provided. However, Fetters promised to investigate and find out where the shipments might be coming from.

Later in March Fetters again wrote Bennett on the matter. He stated in his letter that inquiry of Aermotor branches in Omaha, Tulsa and Amarillo indicated that the branches were adhering to Aermotor's policy of not shipping into a distributor's territory unless so instructed by the distributor. He noted, however, that there was nothing that could be done about a distributor selling into another distributor's territory if this should be the case.

In June, Fetters made a call upon Cowley at Phoenix. As Fetters recalls it, he made it clear to Cowley that he was not to ship windmills directly from the factory warehouse to a customer outside the area of his distributorship. Cowley was permitted to sell out of his own territory of Arizona to customers anyplace he

chose. Fetters also recalls that he advised Cowley that Aermotor did not consider Cowley Pump a good distributor. Cowley was not producing sufficient sales volume in the territory he was supposed to cover.

Cowley recalls it somewhat differently. He testified that in April, 1968, he received a telephone call from Fetters complaining that Cowley was causing Aermotor problems by his shipments of windmills to Smith of Colorado. Fetters further instructed Cowley to pick up at the Aermotor branch in Amarillo rather than the windmill warehouse at Tulsa.

I find that Fetters' purpose of requiring Cowley to pick up his orders at the Amarillo branch rather than Tulsa was not to place Cowley at a disadvantage but to neutralize as much as possible Cowley's attempts to ship directly from Aermotor's outlet in Tulsa to Carder in Colorado, contrary to the published distribution policy. Cowley had as a practical matter created two additional distributorships in Colorado who were actively competing with the recognized Aermotor distributor. Under these circumstances and in view of Cowley's dealings, Aermotor was entitled to take reasonable measures to avoid Cowley's deceitfulness.

Following the phone call from Fetters, Cowley received an order from John Carder. In his discussion with Carder about the order, Cowley noted that while Aermotor opposed Cowley selling into Colorado there wasn't anything that could be said about it if the windmills were first brought into Arizona. Subsequently Cowley placed an order at Aermotor's Amarillo branch for John Carder in Boise City, Oklahoma. This was done so that Carder could pick up the order in Boise City, avoiding the necessity of bringing

the shipment into Arizona. In Cowley's words, the shipment was disguised to go to Oklahoma rather than Colorado. However, this plan was circumvented when the Amarillo branch shipped the order to Cowley at Phoenix who in turn then shipped the order to Carder in Colorado, passing the freight costs on to Carder.

Cowley, however, testified that on June 13 when Fetters called upon him at Phoenix, he was told by Fetters that under no circumstances could he make any shipments into Colorado and that in the event that Cowley persisted, his distributorship would be terminated. Thus Cowley's claim that in June he was told that under no circumstances could he ship into Colorado is somewhat contrary to his understanding that he conveyed to Carder that Aermotor was not in a position to say anything about Cowley's shipments to customers outside of Arizona so long as the product came into Arizona. Cowley's claim of prohibition is contrary to Fetters' March 6, 1968 letter to Bennett in which he told Bennett that there was nothing that could be done about Cowley selling into Colorado so long as the shipment was made out of Arizona. It is also supported by Aermotor's published distribution policy.

It is established in the evidence that Dean Bennett sought to claim that his distributorship in Colorado gave him an exclusive right to sell Aermotor products to dealers or retailers in the State of Colorado. Bennett thought all Colorado sales should be his and repeatedly requested Fetters to take action to stop Cowley's sales to Smith and Carder in Colorado. Fetters, however, never agreed to prohibit Cowley's sales into Colorado and Cowley was never so instructed. The

only restraint imposed on Cowley in connection with his Colorado sales was the requirement that orders to Cowley from outside his territory be shipped out of Arizona.

Cowley's recollection that he was told by Fetters on June 13, 1968 that he must not sell windmills into Colorado under any circumstances is probably incorrect. I find that the restraint placed upon Aermotor distributors, including Cowley, to be as spelled out in the published policy statement. However, there is no doubt that Aermotor and Dean Bennett Supply combined their efforts to enforce the published policy of territorial restraint.

It is well settled that an agreement, the purpose or effect of which was to unreasonably restrain trade, constitutes a violation of Section 1 of the Sherman Act. Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975).

The controlling issue then is whether or not this territorial restriction in itself constitutes a violation of Section 1 of the Sherman Act.

Having found the requisite interest of Cowley and evidence of an agreement enforcing the territorial restriction requiring distributors to sell out of their own territory, a substantial legal question arises as to whether the rule of per se illegality established in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) should be applied to Aermotor's distribution policy and practice.

The per se rule on location limitation has been accepted in other circuits: Hobart Brothers v. Malcom T. Gilliland, 471 F.2d 894 (5th Cir. 1973); Interphoto Corporation v. Minolta Corporation, 471 F.2d 621 (2nd Cir. 1969). I would recognize the territorial restraint on Aermotor on the basis of those authorities as a violation but for the holding of the Ninth Circuit in GTE Sylvania v. Continental T.V.

In an extensive opinion, the per se rule of Schwinn has been limited in the contents of the facts of that case by the Ninth Circuit in GTE Sylvania.

I conclude on the basis of GTE Sylvania that the per se approach should be rejected in favor of a rule of reason analysis. And I quote:

"In Schwinn the Supreme Court held illegal per se a system of vertical restraints affecting both wholesale and retail distribution. Arnold Schwinn & Company had created exclusive geographical sales territories for each of its 22 wholesaler bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory. Moreover, the restrictions in Schwinn limited the classes of customers to whom Schwinn's wholesale distributors and franchised retailers could sell, by prohibiting them from selling Schwinn products to unfranchised retailers. Consequently, Schwinn's system completely barred sales to some potential purchasers of Schwinn products, regardless of where these customers were located." GTE Sylvania Inc. v. Continental T.V. (9th Cir. 1976)

Although the vertical restraints at issue in Schwinn were absolute prohibitions against distributor sales to any customer outside the distributor's designated area as well as to unfranchised dealers within the distributor's area, the language used by the majority seems to strike more broadly at vertical restraints:

> "Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred, whether by explicit agreement or by silent combination or understanding with his vendee, is a per se violation of Section 1 of the Sherman Act." 388 U.S. at 382.
>
> "Under the Sherman Act it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. White Motors, supra; Doctor Miles, supra. Such restraints are so obviously destructive of competition that their mere existence is enough." 388 U.S. at 379.

This language has engendered much critical comment and controversy as shown by footnote 13 of GTE Sylvania.

The facts in GTE Sylvania were that Continental T.V. lost its Sylvania franchise because it violated Sylvania's practice of franchising dealers to sell Sylvania products at designated locations only, and prohibiting the franchisee to move Sylvania merchandise to a new unapproved location for resale. Since Sylvania's locations practice restricted the shipment of inventory after title passed to the franchise, the trial court ruled that the practice was illegal per se based on the sweeping language of the Schwinn opinion.

The Ninth Circuit en banc held that the rule on reason should have been applied by the trial court. The decision of the Circuit limited Schwinn to its facts in holding that Schwinn's proscription of vertical restraint, as per se illegal, refers only to manufacturer restrictions on the location and type of customer to whom the distributor or dealer may sell.

Applying GTE Sylvania to the facts of the instant case, I conclude that Aermotor's conduct must be examined under the rule of reason analysis. The restriction in the instant case is similar to the location practice of Sylvania in that it limits the location from which the distributor can sell, not the customer, not the customer to whom he may sell.

Plaintiffs argue that GTE does not prohibit a per se ruling in this case because, unlike GTE, this case involves horizontal territorial restrictions and the additional restriction that distributors may not actively solicit business outside their assigned territory. However, the shipping-distribution policy at issue is a vertical restraint imposed by the manufacturer on distributors. There is no division of territories by competing distributors in the guise of a vertical restriction. See United States v. Topco Associates, Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc., 388 U.S. 350 (1967). The fact that Aermotor distributes products through factory outlets, as well as independent distributors, does not automatically convert Aermotor's shipping policy into a horizontal arrange-

ment. The cases relied on by plaintiffs for this proposition are all distinguishable and have been considered in the discussion relating to the monopoly claim.

Turning now to the second argument, it is asserted that part of Aermotor's territorial restrictions on its distributors included a prohibition on actively soliciting business outside of the distributor's territory. As I have found, Aermotor's policies did not preclude sales by a distributor to customers outside of the assigned territory so long as the goods were shipped from within the territory of the distributor. Fetters' complaints to Cowley occurred because of Cowley's shipments to Carder and Smith directly from Aermotor's warehouses or branches and the use by Cowley of subterfuge or deceit to conceal the destination of the shipments. Fetters' other complaints had not so much to do with Cowley's soliciting business outside his territory but his failure to develop a sufficient sales volume within Arizona.

I believe Fetters was aware of and accepted the principle that there was nothing he could do about Cowley selling outside his territory providing the products were shipped from Arizona. This is in fact what Fetters was willing to settle for and solicitation of business never seemed to come into it. For so far as I am able to ascertain, Cowley's Colorado business was a result of Carl Estep's initial proposals and Cowley in fact undertook no solicitations for business in Colorado. Cowley's termination occurred because of poor sales volume in his territory and his use of subterfuge to defeat Aermotor's distribution policy. A manufacturer may properly designate the geographical areas in

which distributors may be primarily responsible for distributing its product and may terminate those who do not adequately represent or promote its products within such areas. Reed Brothers v. Monsanto Co., 525 F.2d 486 at 494.

The crux of the matter may be posed thusly: Does the Aermotor shipping-distribution policy unreasonably restrain trade?

The overall market situation, the purpose of the policy, the effect of the policy, and whether there are less restrictive alternatives need to be considered in determining whether the shipping policy is an unreasonable restraint.

The purpose of the shipping policy is to effectuate the exclusive distributorship systems, not to confine Cowley's sales to his own territory. Through his direct factory sale arrangement with Carder and Smith, Cowley was in effect making Carder of Lamar, Colorado and Smith of Haxton, Colorado unauthorized windmill distributors in Colorado. If an Aermotor distributor can, in exchange for a 5 percent commission, make arrangements whereby a dealer can buy truckload quantities of windmills at the Aermotor factory or branch outlet for the distributor discount, any exclusive distributorship would be rendered illusory. Aermotor had a valid concern that allowing Cowley's deals with Carder to continue might constitute a breach of the Aermotor-Bennett distributorship contract. Moreover, it defeated Aermotor's primary purpose of establishing distributorships to promote its products.

Not only did Cowley's direct shipments to Carder undermine the Aermotor distributorship system, but through these arrangements Cowley evaded performing the stocking function and its concomitant overhead which is the essence of a distributorship and which justified the distributor receiving a discount beyond that given to dealers. The shipping policy serves to insure that a distributor actually maintains a stock of products in his territory and thereby earns his discount.

I conclude that Aermotor adopted the shipping policy for legitimate business reasons. However, the test of reasonableness additionally requires that the effect of the shipping policy upon competition not be substantially adverse. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1966).

The shipping policy had some adverse impact on intrabrand competition for sales at the wholesale level. The costs of shipping to Arizona and then on to Colorado would preclude Cowley from affectively competing with Bennett for sales to dealers in eastern Colorado, assuming Bennett offered those dealers the standard dealer discount. This restraint results solely from economic factors. The impact of the shipping costs on competition varies according to the geographical market. For instance, Cowley might not be disadvantaged with respect to sales to dealers in Nevada or any location more distant from the factory outlet than is Cowley. Nor was any impact on prices to the consumer proven. There was no evidence that windmill retail sales dropped or would drop as a result of Cowley's direct sales to Carder and Smith.

When a manufacturer has a very dominant position in a product market, any restraint imposed on intraband competition may have greater impact on the whole market and harm the consumer more than a restraint on interbrand competition. Therefore, such situations call for very careful scrutiny. Nevertheless, I do not find based on the facts of this case that Aermotor's shipping policy has a substantial adverse effect on competition in the windmill market. I conclude the shipping policy is not and was not an unreasonable restraint of trade.

REFUSAL TO DEAL

Plaintiffs claim that Aermotor's refusal to deal directly with Carder, Inc. dba Ranchers Supply violates the Sherman Act.

This claim is closely related to the claim of illegal territorial restraint. Plaintiffs contend that Aermotor's refusal to sell windmills directly from the factory to Carder was part of an agreement or combination between Aermotor and Dean Bennett to prevent plaintiffs from competing with Bennett in Colorado and with Aermotor branch sales agents in western Kansas and Nebraska. It is claimed that Aermotor protected the Colorado market for Bennett and thus enabled him to charge inflated prices for windmills and use windmills to push the sale of Aermotor pumps. Aermotor contends that its refusal to deal with Carder was a unilateral decision on Aermotor's part to retain Bennett as its exclusive distributor in Colorado and that this conduct is protected under United States v. Colgate and Company, 250 U.S. 300 (1919).

Colgate held that in the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict a manufacturer from freely exercising his own independent discretion as to whom he will sell. The Colgate doctrine is still alive and vital. As applied to the instant case, Colgate means that Aermotor can legally refuse to sell directly to Carder as long as (1) the refusal is purely unilateral and is not motivated by monopolistic intent, and (2) the refusal is not part of an agreement or combination that unreasonably restrains trade.

As I have discussed previously in connection with the monopoly claim, there is no evidence that Aermotor intended to monopolize the distribution of windmills or that Aermotor's conduct had the effect of monopolizing the distribution of windmills. In brief, Aermotor's refusal to sell windmills on distributor terms to Carder was not part of a plan to monopolize distribution. The instant case is thus distinguishable from those cases cited by plaintiffs in which a supplier's refusal to deal with a distributor was found to be in furtherance of a plan to monopolize distribution of the product. See Pacific Coast Agricultural Export Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196 (9th Cir. 1975); Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

The inquiry does not end here, however, because Aermotor's refusal to sell to Carder was not purely unilateral conduct. The evidence establishes that Aermotor refused to deal with Carder because of its exclusive distributorship contract with Dean Bennett. Moreover, Fetters discussed the matter of Carder's request to buy directly from Aermotor with Bennett

before he denied Carder's request and told him to try to work out better terms with Bennett. This is clearly sufficient showing of combination for Section 1 purposes under the expanded definition of combination set forth in United States v. Parke, Davis and Co., 362 U.S. 29 (1960).

The agreement was the exclusive distributorship arrangement under which Bennett was granted the exclusive right to buy directly from Aermotor as a distributor. There was no agreement or combination to drive Carder out of business or to exclude him from the Colorado windmill market. In sum, the refusal to deal with Carder would have violated Section 1 of the Sherman Act only if the exclusive distributorship arrangement was itself unlawful.

Exclusive distributor agreements are tested under the rule of reason. Simple exclusive distributor agreements, that is, a contract by which the distributor is granted the exclusive right to purchase and the manufacturer does not restrict the territory or customers to whom the distributor may resell, have been uniformly upheld by the courts as reasonable. Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957). Packard, the leading case on the lawfulness of exclusive distributorships, contains the caveat that "effective competition exists at both the seller and buyer levels." The reasonableness of Aermotor's distribution scheme is put into question because Aermotor has a monopoly position in the windmill market.

Applying the rule of reason now to the refusal to deal with Carder, I conclude, based on the legitimate purpose of the refusal and the absence of a substantial adverse effect on interbrand or intrabrand competition, that the refusal is not an unreasonable trade restraint.

The purpose or motive for Aermotor's refusal to sell directly to Carder from the factory or branch at a distributor discount was not, as Carder claims, to exclude Carder from the Colorado market, but merely to retain Bennett as the exclusive Aermotor distributor. The correspondence regarding the 1967 and 1969 meetings between Carder and Fetters clearly document that Aermotor refused Carder's request because Dean Bennett was performing well as an independent Aermotor distributor. Bennett was strong in pump sales and Aermotor desired to strengthen its competitive position in that market. Carder was a dealer for Sta-Rite pumps, one of Aermotors serious competitors in a keenly competitive pump market. Carder made no offer to take on the full line of Aermotor products, such as pumps as well as windmills. He was interested in buying windmills at distributor quantities and prices. Aermotor had legitimate business reasons to reject Carder's request.

The critical question is whether Aermotor's insistence on retaining the exclusive distributorship arrangement for the State of Colorado had a substantial adverse effect on interbrand or intraband competition.

Bennett Supply had the exclusive right to purchase Aermotor products directly from the Aermotor factory or branch outlets. Therefore, all Colorado dealers, like Carder, had a restricted source of Aermotor products; they could either purchase from Bennett on his terms or from independent distributors outside of Colorado.

Contrary to Carder's contention, the evidence shows that Bennett offered Carder the normal dealer discount on windmills, 25 plus 5. This discount is the same as the Dempster dealer discount and Aermotor windmill prices were competitive with Dempster. Carder's complaints were directed principally to Bennett's prices which he contended were above Aermotor's list price. it is important to note that Carder had access to Dempster windmills. In fact, Carder was for a time a Dempster distributor.

Carder's competition in the Colorado windmill market included Smith Hardware of Haxton, Colorado, Dean Bennett of Denver, and American Pipe and Supply marketing the Dempster windmill.

In sum, there was effective intrabrand competition at the retail level as well as interbrand competition in the Colorado windmill market. The restraint which Carder complains of occasioned by the Bennett exclusive distributorship operated at the wholesale level. When Carder could no longer obtain Aermotor windmills from the Cowley distributorship, he was forced to give up the wholesale business in Aermotor windmills. He continued to serve his retail customers.

Whether Aermotor's restrictions against allowing its own outlets to sell to dealers, such as Carder or Smith, within the area of an exclusive distributorship under circumstances where distributor list price is substantially above factory list price constitutes a violation of the antitrust laws is not presented in this litigation.

I conclude that Aermotor's refusal to deal with Carder of Ranchers Supply as a distributor was based on sufficient business reasons and did not involve or amount to a violation of the Sherman Act.

TORT CLAIMS:

Plaintiffs claim that apart from antitrust considerations, Aermotor's efforts to discourage Cowley from selling direct from the factory to Carder and Smith constitutes tortious interference with contract or prospective advantage.

To recover on a claim for tortious interference with contract rights a claimant must show (1) the existence of a valid contract; (2) defendant's knowledge thereof; (3) breach induced by the defendant; (4) the absence of privilege or justification; (5) damages resulting therefrom. Middleton v. Wallichs Music and Entertainment Co., 536 P.2d 1072 (Ct. App. Ariz. 1975). In that case the lessor covenanted not to rent to the music company but was induced by the music company to do so. Lessee sued the music company.

Although courts have stated that a mere business expectancy as opposed to an existing contract suffices for the first element, all the cases that I have found involve existent contracts in which one of the contracting parties is induced to breach or is prevented from performing. See among other, Pre-Fit Door, Inc. v.

Dor-ways, Inc., 477 P.2d 557 (Ct. App. Ariz. 1970); Meason v. Ralston Purina Co., 107 P.2d 224 (Ariz. 1940).

There is some evidence that Cowley and Carder had an expectation of further business dealings in December, 1970, or a potential contract to purchase more windmills directly from the factory at distributor price less 5 percent, which never materialized because Cowley was afraid he would lose his distributorship if he continued to violate the Aermotor shipping policy. Carder and Smith bought from Burdick and Burdick after Cowley declined to ship another truckload. However, the evidence fails to establish that Aermotor had knowledge of this prospective deal and unjustifiably acted with the purpose of inducing Cowley not to perform.

Fetters' purpose in warning Cowley to adhere to the shipping policy was to give effect to its exclusive distributorship agreement with Dean Bennett. Having found that the exclusive distributorship agreement was not an illegal restraint of trade, Fetters was justified in attempting to enforce it by discouraging Cowley from arranging direct factory shipments to Colorado dealers.

PRICE DISCRIMINATION:

Plaintiffs claim that Aermotor knowingly discriminated against Dixon Crowley and in favor of Dean Bennett with respect to the prices of Aermotor products and that such conduct violates Sectior 2 of the Clayton Act, 15 USC 13.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, makes it unlawful "to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them . . ." 15 USC 13(a).

When Cowley became an Aermotor distributor in 1966, no standard distributor discount existed. Cowley was granted a discount, 30 and 5, which was comparable to the discount afforded Burdick and Burdick in El Paso but less than the discount offered Dean Bennett of 40 and 5, the distributor in Colorado. Cowley was aware at that time that he was not getting the maximum discount. This situation existed until March, 1968, when a uniform Aermotor distributor discount structure was established.

Assuming that the discount differential in 1966-1968 constitutes a violation of the Clayton Act, Section 2, Cowley is barred by the four year statute of limitations in the Act, 15 USC 15(b), from claiming any damages from this period.

A comparison of the invoices from Cowley Pump and Supply and Dean Bennett Supply over the 1969-1971 period shows that some of Cowley's purchases were made at a lesser discount than were Bennett's purchases during the same period. However, the evidence fails to establish that the discount differential on any purchase was the result of knowing price dis-

crimination by Aermotor in favor of Bennett. Cowley may have received lesser discounts because of failure to take advantage of the extra 5 percent quantity discount for truckload shipments of more than 10,000 pounds from the Tulsa factory warehouse or from larger discounts offered distributors for factory as opposed to branch pickup of smaller orders.

During 1969-1971 Aermotor had a uniform discount structure applicable to windmills and parts which offered an additional 5 percent off the standard 40 percent distributor discount for factory as opposed to branch pickup and another 5 percent off for shipments of more than 10,000 pounds which could be ordered only from the factory. Cowley does not contend that the longer discounts for quantity purchases and for factory pickup are not cost justified or discriminate against him. This case thus distinguishable from cases in which a quantity discount theoretically available to all customers was held to violate the Clayton Act because the quantity discount in fact discriminated in favor of a select few large customers who alone had the power to buy at sufficient quantities to warrant the discount. See, Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948).

Apart from the claim of price discrimination in windmill sales, Cowley claims that Dean Bennett was able to purchase pumps at lower prices during 1970-71 and that Cowley was denied the credit which Bennett received for pulling defective motors from Aermotor pump assemblies.

Aermotor did afford Dean Bennett a regional competitive discount in submersible pumps for a limited time during 1970-71 for the purpose of meeting keen price competition from Berkeley in the Denver market. Cowley did not receive the special discount. However, Cowley did not sell any submersible pumps in Colorado during this period. There is no evidence that Cowley ever actually competed with Bennett for the sale of submersible pumps.

The special discount on submersibles afforded Bennett does not offend the Clayton Act because Cowley was not a competitor at the time, and therefore the discount could not possibly have had the effect of injuring competition in the sale of submersible pumps. See, England v. Chrysler Corporation, 493 F.2d 269 (9th Cir. 1974).

Furthermore, the evidence indicates that the special regional discount was justified by the need to meet the submersible pump prices of Aermotor's competitor, Berkeley.

Finally, Cowley has failed to prove that Aermotor denied him credit for pulling motors. Cowley did not show that he had ever requested credit for doing so.

In sum, the evidence is insufficient to sustain the claim of price discrimination.

STATE ANTITRUST CLAIMS:

Plaintiffs claim that Aermotor's course of conduct violates the Colorado and Arizona antitrust statutes, 6 C.R.S., Section 6-4-101 et seq., and A.R.S., Section 44-1401 et seq. These claims do not require extensive discussion.

Although the wording of the Arizona and Colorado statutes may differ somewhat from that of the Sherman Act, there is no indication that the standards for determining whether given conduct violates state law differ from Sherman Act standards. To the contrary, the Arizona Supreme Court has held that the rule of reason established in respect to the Sherman Act applies in construction of A.R.S. 44-1401 et seq. Dattilo v. Tucson General Hospital, 23 Ariz. App. 392, 533 P.2d 700 (1975). See also, Whipple v. Shamrock Foods Co., 26 Ariz. App. 437, 549 P.2d 217 (1976), Bonney v. Northern Arizona Amusement Co., 78 Ariz. 155, 277 P.2d 248 (1955).

Dattilo involved a claim under the Arizona antitrust statute that was repealed and replaced in 1974 by enactment of the Uniform State Antitrust Act. The present statute expressly provides that courts may look to federal case precedent as a guide. A.R.S. 44-1412.

Likewise, the few court decisions under Colorado statutes fail to indicate that Colorado courts would find that business practices which do not violate the federal antitrust law constitute a violation of C.R.S. 55-4-1. See, among others, People ex rel. Kinsey v. Sumner, 525 P.2d 512 (Colo. App. 1974).

In sum, having concluded that plaintiffs have failed to prove a violation of the federal antitrust laws, they likewise fail to prove any liability under state law. It is therefore not necessary to reach the constitutional questions dealing with the supremacy and commerce clauses raised in the briefs.

BRADEN'S COUNTERCLAIM:

Finally, the Braden counterclaim. Aermotor Division has counterclaimed for $12,426.61 which Duke Cowley owes on open account for purchases of Aermotor products prior to Cowley's termination as a distributor. Cowley does not dispute that he owes Aermotor $12,426.61, but contends that Aermotor is barred from asserting this claim because Aermotor has not complied with the requirements of A.R.S. 10-481 for formal qualification of foreign corporations transacting business in Arizona. Aermotor has not complied with Section 10-481, see pretrial stipulation number 44.

The statute provides:

> "No foreign corporation shall transact business in this state until it has complied with the requirements of Section 10-481, and every act done prior thereto is void."

Arizona courts have stated that a corporation must be engaged in enterprise of some permanence and durability and must transact a substantial part of its ordinary business in Arizona for the sanction of A.R.S. 10-482 to apply. L. M. White Contracting Co. v. St. Joseph Structural Steel Co., 488 P.2d 196 (Ct. App. Ariz. 1971).

It is not necessary, however, to decide whether the character and quantity of Aermotor's business activity in the State of Arizona is such as to subject Aermotor to the requirements of A.R.S. 10-481 and the sanctions of 10-482. Even assuming substantial activity, Section 10-482 does not apply to void a business transaction

that occurs outside the state. Neiderhiser v. Henry's Drive-In, Inc., 394 P.2d 420 (Ariz. 1964), holding that A.R.S. 10-482 does not apply to an act done outside the state.

The sale of Aermotor products on which the Aermotor counterclaim is based was transacted outside Arizona. Cowley purchased Aermotor products at the factory or branch outlet in Oklahoma or Texas and then brought the products into Arizona. These circumstances are virtually identical to those in Ranch House Supply Corp. v. Van Slyke, 370 P.2d 661 (Ariz. 1962) which held that the plaintiff was not doing business in Arizona where plaintiff marketed units through franchised dealers in Arizona but the contract was executed in California and the purchase price was fixed at f.o.b. price in California.

I conclude that A.R.S. 10-482 does not bar assertion of Aermotor's counterclaim and that the Aermotor Division of Braden is entitled to recover $12,426.61.

Attorneys for defendant shall prepare, serve and file a proposed judgment.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIXON D. COWLEY, dba COWLEY PUMP AND SUPPLY, GRAHAM L. COWLEY and HUGH H. COWLEY, dba COWLEY BROS. SUPPLY, and CARDER, INC., dba RANCHERS SUPPLY COMPANY,

Plaintiffs-Appellants

v.

BRADEN INDUSTRIES, INC., a Delaware corporation doing business in the State of Arizona,

Defendant-Appellee.

No. 77-3272

OPINION

Appeal from the United States District Court for the District of Arizona

Before: CHOY and KENNEDY, Circuit Judges, and WILLIAMS,[1] District Judge.

KENNEDY, Circuit Judge:

This case arises from a dispute between a manufacturer and its former distributor. The distributor, and a retailer to whom it had made sales, both brought suit against the manufacturer in the District Court for the District of Arizona, alleging violations of federal and state antitrust laws and a state tort claim. The manufacturer filed a counterclaim for amounts due on products delivered to the distributor. The case was

[1] Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

tried without a jury, and the trial court found for the manufacturer on all counts of the complaint, and also on the counterclaim. The distributor and the retailer appeal from the judgment, and we affirm.

The appellants are Dixon D. Cowley (Cowley), the former Arizona distributor of Aermotor products, and Carder, Inc. (Carder), a Colorado retailer which purchased the products in question from Cowley. The manufacturer is appellee Braden Industries, a corporation which manufactures windmills and pumps through its Aermotor Division. We shall refer to Braden Industries as "Aermotor."

The principal concern in the litigation is the marketing and distributing system established by Aermotor for the sale of windmills manufactured by it. Aermotor has for some years occupied approximately 70 percent of the windmill market nationwide. The windmills are used primarily for providing stock water in cattle ranching country. Aermotor also sold pumps, though not necessarily for use in conjunction with the windmills. Aermotor was a relative newcomer in the pump market.

Aermotor used a bifurcated distribution system. One channel of distribution was through sales by company-owned outlets or branches; the other was through sales by independent distributors. Distributorships were established to serve particular geographic areas. Aermotor agreed its branches would not compete with distributors in any given territory. In addition, Aermotor established a policy which discouraged distributors from selling within the territory of another distributor. Under Aermotor's announced policy, distributors could sell outside their territories if: (1) the goods first

came to their territories; (2) the items were placed in stock; and (3) the distributors were not "actively soliciting business outside their assigned territory."

Cowley held the distributorship for Aermotor products in the State of Arizona. In violation of the distribution agreement, Cowley began selling windmills to purchasers in Colorado, including Carder, without first shipping the windmills through Arizona. Carder was reselling the windmills at substantially lower prices than the authorized Aermotor dealer for Colorado, one Dean Bennett. After Bennett complained and Aermotor warned Cowley, Aermotor terminated Cowley for persisting in making sales to Carder. Cowley and Carder then commenced the present litigation, alleging illegal territorial restraints, monopolization and attempted monopolization, price discrimination, refusal to deal, interference with contract rights,[2] and violations of the antitrust laws of Arizona and Colorado.

---

[2] The district court's ruling on the Robinson-Patman Act claim is not being appealed to this court. Upon due consideration of the refusal to deal and interference with contract claims, we agree with the district court that they are without merit.

The district court correctly concluded that the validity of the refusal to deal claim depended on whether the underlying exclusive dealership arrangement and concomitant territorial restrictions constituted unreasonable restraints of trade. Because we conclude *infra* that these restrictions were not shown to be unlawful, the district court's finding that there was no illegal boycott was correct.

Appellants' claim of tortious interference with contract or prospective business advantage is meritless because appellants proffered no evidence at trial to indicate that Aermotor had knowledge of a valid contract as required by Arizona law. *See* Middleton v. Wallichs Music and Entertainment Co., 24 Ariz. App. 180, 536 P.2d 1072. (1975).

Territorial Restraints

The principal issue in this case involves Aermotor's admitted policy concerning sales to distributors. The restrictions imposed by the manufacturer on its distributors to limit sales in a geographic area are a type of vertical restraint. Although the restraints imposed by Aermotor did not prohibit outright sales outside of a distributor's primary area, their enforcement would make such sales economically unfeasible or, at least, significantly less profitable.

Vertical restraints are governed by the rule of reason. *See Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), *overruling United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The basic inquiry under the rule of reason is whether the restraint in question "is one that promotes competition or one that suppresses competition." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978). Courts determine whether the distribution system was unreasonable in view of "the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979); *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2d Cir 1978), *cert. denied*, 439 U.S. 1072 (1979).

The trial court ruled that appellants failed to establish the distribution system in question was unreasonable. Appellants attempt to compensate for their failure to proffer adequate evidence by claiming

that Aermotor, as defendant, had the burden of proving the restraints reasonable. They argue that when a defendant with substantial market power restrains trade, the burden shifts to him to show that the restraints are reasonable. Appellants cite *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), *Purex Corp. v. Proctor & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979), and *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978), to support this contention.

We find no support in any of these cases for appellants' argument. None of these cases involved application of the rule of reason or discussed the burden of proof in such cases. *Purex* and *Brunswick* involved the application of section 7 of the Clayton Act to corporate acquisitions; *Greyhound* involved a claim for monopolization and attempted monopolization under section 2 of the Sherman Act.

The burden to prove a vertical restraint unreasonable is part of the plaintiff's case in chief. *See Magnus Petroleum Co. v. Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir.), *cert. denied*, 48 U.S.L.W. 3258 (U.S. Oct. 15, 1979). The plaintiff in an antitrust action in which the rule of reason governs "must evince a substantial adverse effect on competition in the relevant market to support a viable legal theory." *Mutual Fund Investors v. Putnam Management Co.*, 553 F.2d 620, 627 (9th Cir. 1977). "Unless the alleged anticompetitive conduct is *per se* unreasonable, the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case . . . and *the burden of establishing it lies on him.*" *Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978) (emphasis added), *cert.*

denied, 400 U.S. 936 (1979); *Knutson v. Daily Review, Inc.*, 548 F. 2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 450 F. 2d 769 (9th Cir. 1971), *cert. denied*, 408 U.S. 929 (1972). Appellants simply failed to meet this burden. At trial they used lances to tilt with the windmills and on appeal it is too late to avail themselves of the proper weapons and a different target. We decline to alter the burden of persuasion to compensate for the deficiencies of appellants' trial strategy.

In applying the *GTE Sylvania* standard, the trial court held that the territorial restraints were reasonable for three reasons. First, the requirement that a distributor take goods into his trade area before selling them improved the efficiency in marketing since it ensured the distributor's maintenance of a proper stock of goods and its intense promotion of sales in the assigned area. Second, there was no showing by appellants of any effective, alternate means to maintain an efficient distributor system. Third, there was no evidence that interbrand competition was harmed by Aermotor's shipping policy. These findings of fact were fatal to the appellants' case.

The findings of the district court will stand unless they are clearly erroneous and not supported by substantial evidence. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Smith v. James Irvine Foundation*, 402 F.2d 772 (9th Cir. 1968), *cert. denied*, 394 U.S. 1000 (9169); *Chorek v. RKO Radio*

Pictures, 196 F.2d 225 (9th Cir. 1952). We are unable, due to appellants' failure to adduce sufficient evidence to show that the restraints violated the rule of reason standard, to rule that the district court erred.

The district court noted that "the absence of proof in thise significant areas ... may have been significantly affected since the case was presented originally on the basis of a per se violation under the *Schwinn* standard." When appellants filed their case, the per se rule of *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) was in effect. Nine months prior to the district court's judgment, but two months after trial, we announced our decision in *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980 (9th Cir. 1976) (en banc), *aff'd* 433 U.S. 36 (1977). In our opinion in *GTE Sylvania*, we chose to read *Schwinn* narrowly, holding that its per se ban on vertical restraints applied only to manufacturer restrictions on the sale of products outside the dealer's exclusive territory. Because Aermotor allowed distributors to sell windmills outside their assigned territories, the district court correctly concluded that our opinion in *GTE Sylvania* was controlling and applied the rule of reason to the vertical restraints in question.

The Supreme Court affirmed our en banc opinion in *GTE Sylvania* but concluded that "*Schwinn* is indistinguishable from the location restriction in the present case." 433 U.S. at 46. In overruling *Schwinn*, the Court held that nonprice restrictions should be tested under the rule of reason. Since we had already concluded that vertical restrictions such as those in this case were properly governed by the rule of reason, the applicable legal standard did not change. The dis-

trict court issued a second opinion reanalyzing the vertical restraints in light of the Supreme Court's decision in *GTE Sylvania* and reached the same conclusions that it did in its first opinion.

Neither in their motion for new trial below nor in their appeal before this court have appellants argued that they were prejudiced in any way by the overruling of *Schwinn*. Indeed, the thrust of appellants' argument on appeal has been that Aermotor's marketing practices violated section 1 of the Sherman Act whether tested under the rule of reason or a per se rule. We must conclude, due to appellants' failure to raise the issue, that no prejudice in fact occurred. *See Del Rio Distributing, Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir.), *cert. denied*, 48 U.S.L.W. 3219 (U.S. Oct. 1, 1979).

Monopoly

Appellants further alleged that Aermotor monopolized or attempted to monopolize the windmill industry in violation of section 2 of the Sherman Act. To establish a violation of section 2, it is necessary to prove two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnel Corp.*, 384 U.S. 563, 570-71 (1966). Without addressing the question of whether appellants had standing to raise a section 2 claim, *see In re Multidistrict Vehicle Air Pollution*

M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1972, *cert. denied*, 414 U.S. 1045 (1973), we believe that the district court properly concluded that appellants failed to meet their burden of proof under the *Grinnel* test.

The district court found, and the evidence established, that Aermotor has a predominant position in the windmill market. It controls between 70 and 80 percent of that market, both nationally and in Colorado and Arizona. Thus, the first part of the *Grinnel* test was met. There was no evidence, however, that Aermotor acquired or maintained its market position through the use of predatory conduct as required by the second part. Appellant failed to prove its allegation that Aermotor used its dominant position in the windmill market to improve its pump sales by tying pump sales to windmill sales. Further, we have concluded that the territorial restrictions were not shown to be unreasonable, and there is no evidence that these restraints were used with predatory intent.

STATE CLAIMS

Antitrust Claims

Appellants claimed that Aermotor's conduct violated the Colorado and Arizona antitrust laws. Because appellants have not cited, nor have we found, any authorities which have held conduct similar to Aermotor's to be unlawful under Arizona or Colorado antitrust law, we affirm the judgment of the district court that there were no state antitrust violations.

Counterclaim

Aermotor counterclaimed for $12,426.61 which Cowley owed for purchases of Aermotor products made prior to Cowley's termination as a distributor. Cowley

does not dispute the amount that he owed, but contends that Aermotor is barred from asserting the claim because it has not complied with Ariz. Rev. Stat. §10-481 which requires registration of foreign corporations doing business in the state. Ariz. Rev. Stat. §10-482 further provides:

> No foreign corporation shall transact business in this state until it has complied with the requirements of Section 10-481, and every act done prior thereto is void.

The district court held that it was not necessary to decide whether the character and quantity of Aermotor's activities in Arizona were such as to make it subject to the registration requirement of section 10-481. The court concluded that, even assuming the necessity for registration, section 10-482 did not void the transactions because the products were purchased outside the state.

We believe that the district court was correct. *See Neiderhiser v. Henry's Drive-In, Inc.*, 96 Ariz. 305, 394 P.2d 420 (1964) (Section 10-482 does not apply to an act done outside the state.). In *Ranch House Supply Corp. v. Van Slyke*, 91 Ariz. 177, 370 P.2d 661 (1962), the Supreme Court of Arizona held that a corporation was not doing business in Arizona when it marketed units through franchise dealers in Arizona when it marketed units through franchise dealers in Arizona but the contract was executed in California and the purchase price was fixed at f.o.b. price in California. Here, Cowley purchased Aermotor products at factory

outlets in Texas or Oklahoma and brought the products into Arizona. We conclude that Aermotor was not transacting business in Arizona for purposes of section 10-482.

Finally, appellants contend that if Aermotor's conduct violated either state or federal antitrust law, then recovery on the counterclaim is barred under Ariz. Rev. Stat. §44-1405 (A) & (B) which permits a party to defend on the ground that the claim grew out of illegal conduct on the part of the claimant. Because we have found no violation of federal or state antitrust law, we find it unnecessary to reach this issue.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DIXON D. COWLEY, dba COWLEY PUMP AND SUPPLY, GRAHAM L. COWLEY and HUGH H. COWLEY, dba COWLEY BROS. SUPPLY, and CARDER, INC., dba RANCHERS SUPPLY COMPANY, *Plaintiffs-Appellants* v. BRADEN INDUSTRIES, INC., a Delaware corporation doing business in the State of Arizona, *Defendant-Appellee.*	No. 77-3272 ORDER

Before: CHOY and KENNEDY, Circuit Judges, and WILLIAMS,[1] District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Choy and Kennedy have voted to reject the suggestion for rehearing en banc, and Judge Williams has recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

[1] Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

Supreme Court, U. S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1537

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

DIXON D. COWLEY, d.b.a. Cowley Pump & Supply,
GRAHAM L. COWLEY and HUGH H. COWLEY,
d.b.a. Cowley Bros. Supply, and
CARDER, INC. d.b.a. Ranchers Supply Company

Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation,
doing business in the State of Arizona

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER R. SCOTT
Lawrence, Scott & Lamb
Suite 204 — 525 South Main
Tulsa, Oklahoma

Attorney for Respondent

April 30, 1980

TABLE OF CONTENTS

	Page
Statement of the Case	2
Argument	6
Reasons Why Writ Should Not Issue	6
The Petition Fails To Set Forth Considerations Prescribed In Rule 19	6
Review of Petitioners' Propositions	7
Petitioners' Proposition I	8
Petitioners' First Contention	8
Petitioners' Second Contention	9
Petitioners' Third Contention	10
Petitioners' Fourth Contention	11
Petitioners' Fifth Contention	12
Petitioners' Proposition II	13
Conclusion	16
Certificate of Service	18

TABLE OF CASES CITED

Berkey Photo, Inc. v. Eastman Kodak Company, 603 F.2d 263 (2nd Cir. 1979)	15,16
Brunswick Corp. v. Pueblo Bowl O Mat, Inc., 429 U.S. 477 (1977)	9
Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979)	12

Continental TV, Inc. v. GTE Sylvania, Inc.,
433 U.S. 36 (1977) 7, 8, 9, 11

Cowley v. Braden Industries, Inc., 1980-1
Trade Cas. ¶63, 134 at p. 77, 659 10

Engine Specialties, Inc. v. Bombardier, Ltd.,
605 F.2d 1 (1st Cir. 1979) 12

Greyhound Computer Corp v. IBM,
559 F.2d 488 (9th Cir. 1977) 15

GTE Sylvania, Inc. v. Continental TV, Inc.,
537 F.2d 980 (9th Cir. 1976), aff'd
433 U.S. 36 (1977) 8

Interphoto Corp. v. Minolta Corp.,
295 F. Supp. 711 (S.D.N.Y. 1969), aff'd
per curium 417 F.2d 621 (2nd Cir. 1969) 12, 13

Pittsburgh v. PEPI, Inc.,
531 F.2d 91 (3rd Cir. 1975) 12

Purex Corp. v. Proctor & Gamble Co.,
596 F.2d 881 (9th Cir. 1979) 14

United States v. Arnold Schwinn & Co.,
388 U.S. 365 (1967) 8, 13

United States v. Griffith,
334 U.S. 100 (1948) 14

United States v. Grinnell Corp.,
384 U.S. 563 (1966) 14, 15

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

No. 79-1537

DIXON D. COWLEY, d.b.a. Cowley Pump & Supply,
GRAHAM L. COWLEY and HUGH H. COWLEY,
d.b.a. Cowley Bros. Supply, and
CARDER, INC., d.b.a. Ranchers Supply Company

Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation,
doing business in the State of Arizona

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Braden Industries, Inc., Respondent, opposes the Petition for Writ of Certiorari to the United States Court

of Appeals, Ninth Circuit, filed by the Petitioners. Respondent contends the Opinion of the Court of Appeals, Ninth Circuit, contained in the Appendix to the Petition, is a correct decision which raises no considerations described in Rule 19 of this Court and which raises no issue of law of public importance and which, in fact, raises no issue properly reveiwable by a Writ of Certiorari. The considerations described by Petitioners involve only questions of fact and sufficiency thereof, and no real issue or question of law is involved. For these reasons and those stated hereafter, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Braden Industries, Inc., and specifically its Aermotor division, is a company engaged in the manufacture and marketing of water systems products, including windmills and electric water pumps and water system equipment. The Aermotor windmill was originally manufactured in 1888 and over the course of the years has become a very popular windmill and occupies a large share of the windmill market. On the other hand, the Aermotor division was a relative newcomer in the manufacture of electric water pumps and, through the use of a bifurcated distribution system, was striving to capture a greater share of that market. Braden (herein referred to

as Aermotor) implemented a system of marketing utilizing independent, exclusive distributors in certain geographical areas. In those areas where the distribution function was turned over to an exclusive distributor, Aermotor refrained from duplicating the effort and competing with a distributor within that particular locality. However, the distributor was not restricted as to the area in which he could sell, but he was subject to a Distribution Policy imposed on all independent distributors pertaining to the sale and distribution of all Aermotor products. A copy of the Distribution Policy is reproduced in the Appendix hereto.

Petitioners seek to concentrate on Aermotor's market position in windmills and totally ignore its market position in the manufacture and sale of electrical water system pumps. The entire thrust of attacking the marketing system employed by Aermotor ignores the fact that the marketing system was designed, not only to effect the sale and distribution of windmills, but also the sale and distribution of electrical pumps. The Distribution Policy adopted by Aermotor was designed, not only for more efficient promotion and distribution of all Aermotor products, but also to act as an incentive to increase its share in the electrical pump market.

In Petitioners' Statement of the Case, they raise the inference that Aermotor insured that an Aermotor

branch would be restricted to the extent that it would not sell Aermotor products, either to dealers or at retail, within the territory of an authorized distributor. However, it should be borne in mind that Aermotor branches are but a mere arm of Aermotor itself, they are not separate entities. The bifurcated system of marketing employed by Aermotor is merely one of turning over to independent distributors in certain geographical locations the functions of a distributor, the consideration for which Aermotor would not duplicate the distribution functions within that area. The purpose of the system was to promote interbrand competition by insuring to a distributor that he would reap the benefits of his investment within a particular area. The Petitioners ignore the fact that Aermotor distributors handle all Aermotor products and not merely windmills. The Aermotor distribution policy did not prohibit an independent distributor from selling outside of his area of primary responsibility but did impose one burden upon a distributor. The trial court and the appellate court found this restriction was for the purpose of discouraging "shirttailing" with the basic ultimate purpose to create and operate an effective and efficient system of marketing all of the Aermotor products throughout the United States, and thus stimulate interbrand competition.

The evidence in the trial court was clear that at no time did either Petitioners Cowley or Carder attempt to, or in fact compete with Aermotor in the wholesale sale of windmills or any product within an area adjacent to where they were doing business. The plain fact was that neither Petitioner Cowley nor Carder was ever a wholesale competitor with Aermotor.

The trial court issued two Opinions in this case, both of which are accurately reported in the Appendix to Petitioners' Petition. Every factual determination in those Opinions is sustained by ample evidence which in many instances is cumulative in nature. Petitioners, after losing the case in the trial court on all points, appealed to the United States Court of Appeals, Ninth Circuit, seeking reversal. Petitioners attempted to retry the case on appeal *de novo*, asserting reasons why the trial judge perhaps should have ruled to the contrary, but they raised no significant legal considerations. After full briefing and argument, the Court of Appeals rejected Petitioners' claims and affirmed the trial court on all counts. A Petition for Rehearing With Suggestion of Rehearing *en banc* was filed, and, in due course, the appellate court denied that Petition. The Mandate from that court was issued and filed in the United States District Court for the District of Arizona, at which time the United States Court of Appeals, Ninth Circuit, lost

jurisdiction to hear future matters. After the Mandate was issued, Petitioners filed their Petition for Writ of Certiorari in this case. Accordingly, it is questionable whether jurisdiction in this Court is proper once the Mandate has issued.

ARGUMENT

REASONS WHY WRIT SHOULD NOT ISSUE

This Court has stated on numerous occasions that certiorari should not be granted except in cases involving principles, the settlement of which is important to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts of Appeal.

THE PETITION FAILS TO SET FORTH CONSIDERATIONS PRESCRIBED IN RULE 19

Rule 19 of this Court, while not fully measuring the Court's discretion, sets forth the character of the reasons which will be considered in a review on Writ of Certiorari. Additionally, the rule re-emphasizes that certiorari is not a matter of right, but one of sound judicial discretion, and will not be granted except where there are special and important reasons. It is submitted that the Petition does not set forth any of the enumerated reasons and certainly does not raise any

principles of importance to the public nor any special and important reasons. There is no allegation that the Ninth Circuit Opinion is in conflict with opinions of other Courts of Appeal nor that such Opinion fails to follow the principles enumerated in this Court in *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). In fact, the argument set forth in the Petition more nearly reflects an attempt to appeal the decision of the trial court for a second time, as opposed to setting forth reasons why a Writ of Certiorari would be proper under Rule 19. Numerous references are made to the transcript on appeal, which is not before this Court, as well as various trial exhibits, and an effort is made, once again, to retry, on appeal, the issues decided by the trial court. A second appeal is not a proper ground for issuing a Writ of Certiorari.

REVIEW OF PETITIONERS' PROPOSITIONS

Petitioners raise two basic propositions for their reasons why a Writ should issue. The first deals with territorial restraints under §1 of the Sherman Act, while the second deals with monopolization under §2 of the Sherman Act. In the first proposition, Petitioners raise five alleged errors, none of which constitutes a ground for issuing a Writ of Certiorari under Rule 19. Briefly, however, Respondent will deal with each of the five points.

Petitioners' Proposition I

Petitioners' First Contention

The trial court concluded that the distribution system employed by Aermotor was to be tested by the rule of reason and was not to be considered *per se* unlawful. The trial court relied upon the Ninth Circuit Opinion of *GTE Sylvania, Inc. v. Continental TV, Inc.*, 537 F.2d 980 (9th Cir. 1976), *aff'd* 433 U.S. 36 (1977). All of the evidence before the trial court dealt with the reasonableness of the Aermotor marketing policy, and Petitioners adduced no evidence as to whether the marketing policy was unreasonable nor what effect, if any, it would have on either interbrand or intrabrand competition. Petitioners based their entire case upon the doctrine of *per se* liability announced in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), which was reversed by this court. The trial court had before it the "credible and uncontradicted expert marketing testimony of Dr. Hamm" to the effect that the marketing policy employed by Aermotor was, indeed, reasonable. (Trial Court Second Opinion, p. 7). The trial judge carefully examined the *Sylvania* decision and enumerated the various factors which led him to believe that the marketing policy was not an unreasonable restraint of trade. He reviewed specifically the *purpose* of the policies, the *alternatives* and the *competitive impact*

upon the market place. The marketing policy was found to apply not only to the marketing of windmills, but to all of the various Aermotor products. Further, the trial court found that *Sylvania* required that vertical restrictions must be judged on an individual basis for reasonableness. (Trial Court Second Opinion, p. 5). Petitioners' First Contention is without merit.

Petitioners' Second Contention

Contrary to Petitioners' viewpoint as to the purpose of the antitrust laws, it is clear that the antitrust laws are designed to protect competition, not specific competitors. *See Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477 (1977). Petitioners' Second Contention ignores the effect on competition as a whole and focuses only on the particular effect that a policy may have on a particular competitor. The trial court and the appellate court reviewed the competitive impact of the policy in question from the standpoint of overall competition and not with any particular reference to the Petitioners. The competitive effect of the policy in question must be judged on a level of competition between Aermotor and its competitors. If not viewed from such competitive effect, then the entire system of competition could break down; hence, there would be no further competition at that level. Petitioners' comment in their footnote at page

10 of the Petition is answered by noting that they failed to meet their burden of proof. (*See Cowley v. Braden Industries, Inc.*, 1980-1 Trade Cas. ¶63, 134 at p. 77, 659).

Petitioners' Third Contention

Related to the Second Contention, the Third Contention overlooks the level of competition from which a particular marketing practice must be viewed. In analyzing the marketing practice employed by Aermotor, one must look to *interbrand* competition. If a manufacturer cannot maintain a reasonable share of a market, then that manufacturer, of necessity, will go out of business, thus reducing interbrand competition. As mentioned previously, the antitrust laws are designed to encourage and protect competition and not necessarily competitors. Further, Petitioners failed to show any adverse effect on interbrand competition caused by the Aermotor marketing policy. As noted by the trial court and the Court of Appeals, this was their burden, and this burden they failed to fulfill. To the contrary, Respondent proved that the marketing policy had a beneficial effect on interbrand competition, and there were no acknowledged adverse effects on intrabrand competition in evidence before the trial court.

Petitioners' Fourth Contention

The trial court found no willful acquisition nor any purposeful maintenance of a monopoly at either the manufacturing level or the distribution level. The court found that the large market position of Aermotor in the windmill market was because they had a better product that was accepted by the public and also as a result of attrition of other manufacturers in the windmill market. Clearly, Aermotor had no large market share in the electric pump market. At the distribution level, Cowley was not replaced by a branch or by an Aermotor-owned operation, but he was replaced by another independent distributor. There was no evidence that Aermotor, with its large share of the market in windmills, attempted to take over the entire distribution of its own products. The Petitioners' evidence and all of the evidence showed that the Aermotor windmill was "a better mousetrap." (Trial Court First Opinion, p. 8). Further, there was no evidence of the use of any monopoly power for an unlawful purpose. Petitioners contend that intrabrand competition should control, citing footnote 19 to this Court's Opinion in *Sylvania, supra*, but a reading of that footnote indicates that interbrand competition is the competition among manufacturers of the same generic products and is the *primary concern* of the antitrust laws. Any effect upon intrabrand competition is

secondary in consideration to the effect on interbrand competition.

Petitioners' Fifth Contention

Having failed in their burden of proof as to the unreasonableness of the Aermotor marketing policy, the Petitioners concocted an eleventh hour approach that the vertical restraint was now a horizontal restraint and hence a *per se* violation. However, the evidence is unchallenged that the Petitioners never engaged in any horizontal competition with Aermotor, and, therefore, there could not be any horizontal relationship between the parties. This the trial court concluded. Petitioners contend that the trial court's Opinion is at "odds" with other authority, citing *Pittsburgh v. PEPI, Inc.*, 531 F.2d 91 (3rd Cir. 1975), but that case applied a *per se* doctrine to a vertical restriction wherein the manufacturer attempted to police the vertical division of markets for the benefit of horizontal competition. They also cite *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979), which again was a vertical restraint to enforce horizontal restraints among competitors. They also cite *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979), which involved an agreement among competitors. They also cite *Interphoto Corp. v. Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd*

per curium 417 F.2d 621 (2nd Cir. 1969). The *Interphoto* case was a pre-*Schwinn* case and involved restrictions among competitors which were truly horizontal in nature. In short, none of the cases cited by Petitioners is applicable to the facts in this case. There was no evidence to support Petitioners' contention that a horizontal relation existed. In any event, this is another attempt to retry a fact situation for a second time on appeal, and is not a proper ground for review by certiorari.

Petitioners' Proposition II

Monopolization Under §2 of the Sherman Act

Under this proposition, Petitioners suggest that this case presents an opportunity to review conduct *potentially* violative of the federal antitrust laws. Clearly, a potential violation of the antitrust laws raises no issue properly reviewable under Rule 19 of the rules of this Court. A potential violation, if indeed there is one, is not an acutal violation, nor is it an actual justiciable cause which would raise special important reasons for review by this Court upon a Writ of Certiorari. A potential violation does not raise any conflict among the circuits, nor should any potential violation be of any interest to this court. Petitioners raise the issue that the trial court and the appellate court

made a finding of lack of "predatory conduct or intent" and make the conclusion that this is the only reason upon which the Petitioners' claim for monopoly failed in the trial court and upon appeal. That is not correct.

Both the trial court and the appellate court followed the rule set forth in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and found there was no willful acquisition or maintenance of a monopoly nor was there any use of monopoly power for an unlawful purpose. The Court found there was no use of monopoly power to foreclose competition, to gain a competitive advantage or to destroy a competitor. *See U. S. v. Griffith*, 334 U.S. 100 (1948). In addition, the trial court went on to find that there was a lack of competition between the Petitioners and this Respondent, and, therefore, they had no standing to maintain the claim under §4 of the Clayton Act. Further, the appellate court found Petitioners failed to meet their burden of proof under the *Grinnell* test.

The phrase "predatory conduct or intent" should be equated to "willful acquisition or maintenance" of a monopoly. Whether conduct is described as "predatory," "exclusionary," "coersive" or "not honestly industrial," all such labels are descriptive of willful or intentional conduct. There is no conflict among the circuits as to the use of this term. The cases cited by Petitioners in this regard are cases from within the Ninth Circuit, and

that is not a ground for review by certiorari. Moreover, the cases cited do not stand for the proposition for which Petitioners would suggest. For example, *Purex Corp. v. Proctor & Gamble Co.*, 596 F.2d 881 (9th Cir. 1979) recognizes the concept of predatory conduct. The quoted portion from *Greyhound Computer Corp. v. IBM*, 559 F.2d 488 (9th Cir. 1977) does not support Petitioners' contention. The court in that case said if IBM possessed a monopoly power, then IBM would be precluded from employing otherwise unlawful practices in furtherance of that power. In other words, it was a question for the jury whether the use of monopoly power was for an unlawful purpose. The trial court in this case found that the use of Aermotor's market position was not for an unlawful purpose.

In addition, the trial court found Aermotor's windmill market position was due to having a superior product and attrition of other windmill manufacturers during World War II. (Trial Court First Opinion, p. 8). Therefore, Aermotor's market position was the result of growth and development as a consequence of a superior product, and historic accident. See *U.S. v. Grinnell Corp.*, *supra*. This case has not been tainted with an emphasis on predation.

Petitioners cite *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263 (2nd Cir. 1979). That case

has absolutely no application to the case in question. That case involved an attempt by one having a large market position to exert that market postion to increase its market position in an unrelated or different product. In other words, that case involved the use of monopoly power to gain competitive advantage. The trial court expressly found no such use in this case. Once again, however, this was a factual determination sustained by the appellate court on appeal, and now is not the proper subject of review by this Court under Rule 19. The issues involved in this case and the *Berkey* case, as indeed all cases cited by Petitioners, are distinguishable from the propositions raised in this proceeding.

Petitioners' Proposition II, like Proposition I, does not deal with any consideration suggested by Rule 19 governing review on certiorari.

CONCLUSION

In summary, the Petitioners have failed to raise any contention which would warrant review by this Court on certiorari. There is no contention that the Court of Appeals, Ninth Circuit, has rendered a decision in conflict with a decision of another Court of Appeals on the same matter, nor that it has decided an important question of federal law which has otherwise been settled by this Court. In essence, the Petitioners seek to have a

second appeal upon factual issues which were thoroughly considered by the Court of Appeals. The last minute argument pertaining to "predatory conduct or intent" was not even raised before the Court of Appeals. The Court of Appeals reviewed all of the facts in the record on appeal as applied to the law and concluded that the trail court's decision was not clearly erroneous and should be upheld. Petitioners have not raised any issue or principle of importance to the public. Petitioners' request that this Court review conduct "potentially" violative of federal antitrust laws is insufficient. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROGER R. SCOTT
LAWRENCE, SCOTT & LAMB
Suite 204 — 525 South Main
Tulsa, Oklahoma 74103
Attorney for Respondent

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Braden Industries, Inc., a member of the Bar of this Court, hereby certifies that on the 30th day of April, 1980, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, caused three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Mails at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record as follows:

Leo R. Beus
David L. White
Jennings, Strous & Salmon
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

Roger R. Scott

APPENDIX

APPENDIX

TO: All Branch Managers, Salesmen, Manufacturer's Representatives and Distributors

FROM: James E. Fetters
Marketing Manager

SUBJECT: SALES POLICY

A statement of policy was issued May 23, 1969, which was Aermotor policy before the statement was issued and continues to be Aermotor policy.

> Under no circumstances does Aermotor condone the Conditioning of the sale of windmills on the sale of pumps. We do, however, place our main emphasis on the sales of pumps and when sales of pumps conflicts with the sales of windmills, the pump sales take precedent over the sales of windmills in selecting a market outlet.

The following restatement of policy also seems to be in order:

> Aermotor will not knowingly ship pump and/or windmill merchandise from Aermotor stocking points into the territory of an exlcusive distributor without an order or consent from the distributor with whom we have an agreement for the territory.
>
> Aermotor customers are free to sell and/or ship Aermotor merchandise from their stock in their

territory as they may see fit so long as they do not violate their agreement by actively soliciting business outside their assigned territory.

AERMOTOR

s/ J. E. Fetters

Supreme Court, U. S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1537

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

DIXON D. COWLEY, d.b.a. Cowley Pump & Supply, GRAHAM L. COWLEY and HUGH H. COWLEY, d.b.a. Cowley Bros. Supply, and CARDER, INC. d.b.a. Ranchers Supply Company

Petitioners,

vs.

BRADEN INDUSTRIES, INC., a Delaware corporation, doing business in the State of Arizona

Respondent.

SUPPLEMENTAL APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROGER R. SCOTT
Lawrence, Scott & Lamb
Suite 204 — 525 South Main
Tulsa, Oklahoma 74103

Attorney for Respondent

May 7, 1980

(TRIAL JUDGE'S SECOND OPINION)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CIV-72-695-PHX

DIXON D. COWLEY, et al.,
Plaintiffs

vs.

BRADEN INDUSTRIES, INC.
Defendant

BEFORE HON. JAMES M. FITZGERALD,
JUDGE PRESIDING

DATE: August 31, 1977
TIME: 11:35 a.m.
SUBJECT: Judge's Ruling

PROCEEDINGS

THE COURT: I wish to place of record now my rulings and findings on the motion for a new trial or for amended findings in Cowley versus Braden Industries.

I previously made findings and conclusions on the record in this case last January 20th of this year. Subsequently, the plaintiffs have filed a timely motion for a new trial or alternatively for amended findings and conclusions. The motion has been thoroughly briefed and argued.

One issue raised by the motion for a . ew trial merits further consideration. Cowley contends that I have misapplied the rule of reason to the facts of this case. In light of the recent decision of the Supreme Court in Continental T. V. versus GTE Sylvania, 45 U. S. Law Week 4828, June 21, 1977, the dispositive issue is whether Aermotor's shipping policy constituted a reasonable trade restraint. The GTE case held that vertical restrictions on distributors should be judged under the rule of reason standard. I have examined the reasonableness of the shipping policy of Aermotor in light of the facts and the relevant case law, including GTE.

Cowley argues that when properly analyzed, Aermotor's shipping policy must be found to be an unreasonable trade restraint because the shipping policy functioned to reduce intrabrand competition, and this decrease in intrabrand competition was not justified or offset by any benefit to interbrand competition. According to Cowley, the key question in applying the rule of reason test to a vertical restriction is whether the restraint on intrabrand competition produces net economic benefits through enhancement of interbrand competition. Unless the answer to that is in the

affirmative, then the vertical restriction must be considered an unreasonable restraint of trade.

Plaintiffs suggest that GTE emphasizes that competitive impact, in terms of potential for intrabrand harm or interbrand benefit, is the pivotal factor in evaluating a vertical restriction. This is correct. However, the Supreme Court in GTE was not discussing how to analyze a restriction under the rule of reason test. Instead, in GTE the Court was concerned with determining when a restriction should be judged under the per se rule as opposed to the rule of reason. We note from the decision that a court should apply the per se rule of illegality only after it has considered the competitive impact of the challenged restriction and has concluded that the anticompetitive consequences outweigh the pro-competitive consequences. Under such circumstances the effect on competition is pernicious and without any redeeming virtue.

In commenting upon the favored rule of reason test, the Court said:

> "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."
> 45 U. S. Law Week at 4831.

The Court in GTE also quoted with approval the statement of the rule of reason by Justice Brandeis in Chicago Board of Trade versus United States, 246 U.S. 231, 1918. Quoting from Chicago Board of Trade:

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of the intent may help the court to interpret facts and to predict consequences."

These instructive statements of the rule of reason reflect plaintiffs' contention that Aermotor's shipping policy must be deemed an unreasonable restraint if it results in a net decrease in competition in the market place as a whole. Plaintiffs' application of the rule of reason would operate like a partial per se rule; foreclosing the need to look to all of the circumstances and to weigh the purpose and justification for the restriction against its competitive effects. Plaintiffs' rule of reason analysis would hold that all vertical restrictions imposed by a manufacturer with a dominant market position would be unreasonable. Such a result is contrary to GTE. The teaching of GTE is that vertical restrictions must be judged on an individual basis for reasonableness. As Justice White points out in his concurring opinion in

GTE, the Court could have distinguished U. S. versus Schwinn and Company and thereby save the application of the per se rule in Schwinn on the basis that Schwinn enjoyed a dominant market position and, therefore, the territorial restrictions on distributors adversely affected both intrabrand and interbrand competition. The Court, however, in GTE expressly overruled Schwinn rather than distinguishing it and thereby implied that it is not necessarily unreasonable for a dominant manifacturer such as Schwinn to impose territorial restrictions as part of its marketing practice.

While I reject plaintiffs' contention that the determinative factor in the rule of reason analysis of Aermotor's shipping policy is the net competitive impact, the competitive effect of the shippling [*sic*] policy is the single-most important factor in determining its reasonableness. The effect of the shipping restriction on intrabrand and interbrand competition must be considered in light of the purpose of the restriction and possible alternative means to accomplish that purpose in order to determine if the restriction is reasonable.

I now turn to the application of the rule of reason to the facts of this case. On re-examination of the circumstances, my conclusion remains the same: the shipping policy is not an unreasonable restraint of trade. Several of the factors which lead to this conclusion are as follows:

1) Purpose. The purpose of the shipping policy was to make effective the independent exclusive distributor part of the Aermotor marketing system. The shipping policy is an integral part of the distribution system which moves all Aermotor products, pumps as well as windmills. Aermotor is a relative newcomer in the pump

market with a minor market share. Aermotor desires an efficient distribution system in order to effectively compete in the pump and windmill markets. The requirement that a distributor take goods into his trade area before selling them improves the efficiency in marketing since it serves to insure that the distributor will maintain a proper stock of goods and will intensively promote sales in his trade area.

Cowley and other Aermotor distributors received the distributors' discount, a longer discount than that offered dealers, as consideration for performing these stocking and promotion functions. When Cowley shipped windmills directly from the factory to Carder in Colorado, he took advantage of the discount without incurring overhead for stocking the mills and promoting their sale in his trade area.

2) Alternatives. Aermotor's requirement that distributors take goods into the area of their distributorship before selling to dealers was necessary to maintain an efficient independent distributorship system. Without the shipping policy, Aermotor's distributorship system would have eroded because distributors would lack incentive to stock and promote Aermotor products in their own trade areas. According to the credible and uncontradicted expert marketing testimony of Dr. Hamm, a "conflict channel" is created when a distributor is permitted to function as a broker and make easy direct sales into another distributor's area as did Cowley. The distributor whose territory is raided resents the direct sales into his marketing area and loses incentive to stock and promote products in his own area. This is precisely what happened when Cowley sold directly to Carder in the area of Bennett's distributorship. To avoid this conflict

between distributors, manufacturers commonly impose a requirement similar to Aermotor's shipping policy that distributors must take the product into their distributorship area before selling into the market.

There was no showing of any effective alternative means to maintain an effective distributors' system. Plaintiffs suggest that Aermotor could have applied the trans-shipment policy to pumps only, leaving distributors free to sell mills directly from the factory. This would be tantamount to abolishing the exclusive distributorship system with respect to windmills; it is not a reasonable alternative to maintaining an efficient and smooth running distributorship system.

3) Competitive Impact. The most important factor is the effect of the shipping policy on competition in the windmill market. The competitive effect in the market as a whole was not substantially adverse. Intrabrand competition between distributors was decreased. However, this competition between Aermotor distributors for windmill sales was not completely eliminated; it was regulated.

Significantly, interbrand competition existed to provide a check on any potential exploitation of intrabrand market power from Aermotor's dominant windmill market position. Competing brands of windmills, usually Dempsters, reasonably interchangeable with Aermotor windmills were available to distributors, dealers and consumers.

Finally, there was no proof that interbrand competition was either benefitted or harmed by Aermotor's shipping policy. For example, plaintiffs did not show that Aeomotor increased its share of the

windmill market by reason of the shipping policy and exclusive distributorship marketing system. In fact, there was evidence that Aermotor's competitors, notably Dempster, employed a similar distributorship system.

Possibly the absence of proof in these significant areas or the proof offered may have been significantly effected since the case was presented originally on the basis of a per se violation under the Schwinn standard.

To summarize, the record demonstrates that Aermotor's shipping policy was designed to effectuate an efficient, independent distributorship marketing system; was reasonably related to the goal of efficient marketing of Aermotor products; and had no substantial adverse effect on competition in the windmill market as a whole. Under these circumstances, the shipping policy is not an unreasonable restraint of trade.

On the basis of the findings and conclusions previously made, the motion for a new trial is denied.

(Proceedings terminated at approximately 11:55 a.m.)

CERTIFICATE OF SERVICE

The undersigned attorney of record for Respondent, Braden Industries, Inc., a member of the Bar of this Court, hereby certifies that on the 7th day of May, 1980, in compliance with Rule 33(1) of the Rules of the Supreme Court of the United States, caused three copies of the foregoing Supplemental Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari to be deposited in the United States Mails at Tulsa, Oklahoma, with first class postage prepaid, addressed to the following counsel of record as follows:

Leo R. Beus
David L. White
Jennings, Strous & Salmon
111 West Monroe
Phoenix, Arizona 85003
Attorneys for Petitioners

Roger R. Scott